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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-5084

- -X

EDDIE SPRAGGINS,
Petitioner,

-against-

WALTER D. ZANT, Warden,
Respondent.

- -X

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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July 16, 1982

QUESTIONS PRESENTED

1. Whether the resentencing jury's consideration of an aggravating circumstance which was not established in the first trial violated the Fifth Amendment's ban against double jeopardy?

2. Whether petitioner was denied due process of law when the prosecution was permitted to submit proof to the jury on the existence of an additional aggravating circumstance?

3. Whether the jury's consideration of inflamatory evidence without the guidance of judicial standards deprived petitioner of the prescribed sentencing procedure recognized in Gregg to be required by the Eighth and Fourteenth Amendment?

4. Whether the automatic appellate review provided by Georgia's statute was adequate to ensure against the random, arbitrary and unconstitutional imposition of the death penalty?

5. Whether the fact that no jury ever sentenced petitioner on the basis of a statutory aggravating circumstance that was so clearly defined as to neutralize subjective inflamation of the jurors, violated petitioner's Sixth Amendment right?

6. Whether distribution to the resentencing jury of a written copy of a jury charge identical to the defective charge at petitioner's first sentencing violated his Sixth, Eighth, and Fourteenth Amendment rights?

7. Whether petitioner was denied his Sixth Amendment right to effective assistance of counsel at both trials and on appeal?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner Eddie Spraggins ("petitioner") prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia affirming the denial by the Butts County Superior Court of his petition for a writ of habeas corpus.

OPINION BELOW

The opinion of the Supreme Court of Georgia, a one sentence order, is not yet officially reported and is annexed as Appendix A. The opinion of the Superior Court of Butts County, not yet officially reported, is attached as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 17, 1982. No motion for rehearing was filed. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This cause involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, set forth in Appendix C.

2. This cause also involves the following constitutional provisions and statutes of the State of Georgia included in Appendix C hereto: GA. CONST. Art. 1 §§20-101, 2-111; Ga. Code Ann. §§27-2206; 27-2503; 27-2534.1, 27-2537.

STATEMENT OF FACTS

Petitioner is a 34 year old man. He is functionally illiterate and his intellectual range has been diagnosed as that of mild mental retardation.

On March 1 and 2, 1977, petitioner was tried and found guilty of the rape and murder of Francis Coe, a fifty-five year-old neighbor, on January 31, 1977. Petitioner was sentenced to death for the murder based upon the jury's finding of the existence of a statutory aggravating circumstance, rape. Ga. Code Ann. §27-2534.1.

On appeal of the conviction and sentence to the Supreme Court of Georgia, that Court, on February 31, 1978, affirmed the convictions for murder and rape, but reversed as to the death sentence for murder (Appendix D). Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978) (hereinafter "Spraggins I"). The grounds of the reversal were that:

> The [trial] court's sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (Fleming v. State, 240 Ga. 142(7)), 240 S.E.2d 37 (1977), and failed to inform that jury that they

were authorized to consider mitigating circumstances in contravention of requirements laid down in Code Ann. §§27-2534.1(b) and 27-2534.1(c), Hawes v. State, 240 S.E.2d 833 (1977).

243 S.E.2d at 23.

The retrial of the sentencing portion of petitioner's case occurred on May 22, 1978. At that trial, the prosecutor, seeking the death penalty, attempted to demonstrate the existence of two aggravating circumstances (Tr.-2 at 74-75).* The first aggravating circumstance with which the prosecution was concerned was the rape of the victim; the second aggravating circumstance, about which the jury in the first trial was not charged at all, was that the murder was "vile, horrible, and inhuman in that it involved torture, depravity of mind or an aggravated battery." (Tr.-2 at 75).

The direct evidence presented by the prosecution dwelled on the mutilated state of the victim's body and was heavily constituted by oral description or authentication of photographs of the body, subsequently admitted into evidence.**

At the close of the evidence and summation, the jury was charged orally and in writing. The oral charge

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* Throughout the petition, references to the transcript of the lower court in the 1978 trial will be designated as ("Tr.-2 at _____)". References to the lower court in the 1977 trial will be designated as ("Tr. 1 at _____)".

** The prosectution called ten witnesses. Six of those witnesses, whose direct testimony constituted about forty-eight pages of transcript out of a total of approximately fifty-six pages of prosecution witnesses' direct testimony, either authenticated photographs taken of the body or orally described the conditions of the body. Highly detailed descriptions of wounds were given by both the chief investigator, Bert Davis (Tr.-2 at 130-131) and the coroner, Dr. Byron Dawson (Tr.-2 at 174-178).

determining a sentence, they were authorized to consider all circumstances in aggravation or mitigation. They were informed that they should look for specific statutory aggravating circumstances suggested by the evidence and that the presence of such circumstances could warrant a sentence of death. The judge also instructed that even if aggravating circumstances existed, a life sentence could be recommended.

The written charge (Appendix F, hereto) was presented to the jury in this way:

> "Now, ladies and gentlemen of the jury a list of those aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you [the jury] in the jury room during your deliberation."

(Tr.-2 at 298). This document, entitled "Punishment Charge", did not instruct the jury that they were authorized to consider mitigating circumsntaces and did not say that even if aggravating circumstances were present, a life sentence could be imposed.

After deliberation, the jury returned with a sentence recommending death. Petitioner appealed the death sentence to the Supreme Court of Georgia, where the sentence was affirmed (Appendix D); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979) (hereinafter, "Spraggins II"). Petitioner's initial writ of certiorari was granted and remanded for review in light of Godfrey v. Georgia, 446 U.S.420 (1980). Spraggins v. Georgia, 446 U.S. 961 (1980).

Petitioner filed a timely written motion for full briefing and oral argument on July 1, 1980. This motion was denied and the Georgia Supreme Court reimposed the death

sentence on September 24, 1980. Spraggins v. State, 246 Ga. 432, 271 S.E.2d 828 (1980).

A second petition for writ of certiorari was filed in the Supreme Court of the United States on November 23, 1980. This petition was denied, with Justices Marshall and Brennan dissenting on both Eighth Amendment and Godrey, supra, grounds. Spraggins v. Georgia, 451 U.S. 910 (1981). The Supreme Court of the United States further denied petitioner's timely filed motion for rehearing. Spraggins v. Georgia, 452 U.S. 932 (1981).

On July 22, 1981, The Superior Court of Meriwether County held a resentencing hearing, and set petitioner's execution for August 3, 1981. A stay of execution was ordered on July 30, 1981 to allow the petitioner to file a petition for writ of habeas corpus.

The Superior Court of Butts County denied the petition for writ of habeas corpus on January 4, 1982. The Supreme Court of Georgia denied petitioner's appeal.

HOW THE FEDERAL QUESTIONS WERE RAISED

The substantial federal questions described were properly raised during a series of state court proceedings. See, e.g., Spraggins I, 240 Ga. 759, 243 S.E. 2d 20 (1978); Spraggins II, 243 Ga. 73, 252 S.E. 2d 620 (1979). Although the Georgia Supreme Court denied appeal, the Superior Court of Butts County considered the following federal constitutional questions:

1. Whether the submission of a statutory aggravating circumstance at the resentencing trial, which was not

submitted at the initial sentencing trial, violated federal constitutional standards respecting double jeopardy and due process of law. The Superior Court explicitly considered and decided these issues. See Appendix B at 5-7.

2. Whether the Georgia statute failed to insure against a capricious and arbitrary determination in the petitioner's sentencing. This Court explicitly put the Georgia Supreme Court on notice that the seventh aggravating circumstance in the state's capital sentencing scheme (Ga. Code Ann. §27-2534.1 (b)(7)) may be unconstitutional for lack of definition, Greg v. Georgia, 428 U.S. 153, 201 (1976). The Georgia Supreme Court, upholding the jury, presumably found the statute constitutional. Spraggins II, 243 Ga. 73, 252 S.E. 2d 620 (1979). The Superior Court's reliance upon these decisions therefore, included a federal constitutional dimension.

3. Whether the sentencing instructions, as provided for in Ga. Code Ann. 27-2534.1(b), were subject to defects as to prevent the jury's consideration of mitigating circumstances. Although no specific reference to federal law was made in this determination, the Superior Court relied upon the holding in Spraggins II, 243 Ga. 73, 252 S.E. 2d 620 (1979), in its decision. The Georgia Supreme Court, in reviewing the sentence instructions, followed the reasoning in Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977) and Hawes v. State, 247 Ga. 327(9), whose foundations are explicitly and indissolubly welded to constitutional principles and decisions articulated by this Court. The Superior Court's determination, simply citing the Spraggins II decision, necessarily involved a matter of federal law.

4. Whether failure of counsel to provide effective assistance violated constitutional guarantees. The Superior Court explicitly recognized the federal constitutional dimension of this question. See Appendix B at 4-5.

REASONS FOR GRANTING THE WRIT

This Court has recognized the unique and awesome nature of the State's power to determine whether a human life should be taken or spared. Because of the absolute and irreversible impact of this determination, this Court has mandated that the death penalty may be constitutionally imposed only under procedures that ensure that the state's power to decree death is not wantonly and capriciously exercised.

Petitioner was denied the protection of those procedural safeguards declared by this Court to be constitutionally required. The sentence of death, imposed by a jury that: was permitted to sentence on a ground neither raised nor established in the first sentencing hearing; was improperly instructed; and was undirected by an adequately defined statutory standard, constitutes cruel and unusual punishment. Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated in these proceedings.

1. PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF THE FIFTH AMENDMENT BAN AGAINST DOUBLE JEOPARDY AND IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW

At the resentencing trial, the State introduced a second aggravating circumstance which was neither pursued nor found in the first trial of the petitioner. This

second aggravating circumstance was the sole aggravating circumstance found by the jury in the resentencing trial of the petitioner.

Under Georgia law the judge at the presentencing hearing is required to instruct the jury to consider any of the statutory aggravating circumstances which may be supported by the evidence. Ga. Code Ann. §27-2534.1(b) and (c). Georgia law also provides "that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible" at the presentencing hearing. Ga. Code Ann. §27-2503(a) (emphasis added). In petitioner's first sentencing hearing the judge instructed the jury that it could sentence petitioner to death if it found that the murder was committed while the defendant was engaged in the commission of the capital offense of rape. This is the only statutory aggravating circumstance which the judge instructed the jury to consider, see Ga. Code Ann. Section 27-2534.1(b); the Georgia Supreme Court held that "(t)his was the only aggravating circumstance as to which the defendant had been put on notice." Spraggins I, 243 S.E.2d 20, 23 (1978) (citing Ga. Code Ann. §27-2503).

Following the Georgia Supreme Court's decision setting aside the death sentence and ordering a new sentencing trial the prosecution submitted its sentencing case to the second jury on the theory that two aggravating circumstances were present in the case--the one that was charged in the first trial and the additional circumstance that the murder was outrageouly or wantonly vile, horrible or inhuman. See Ga. Code Ann. §27-2534.1(b)(7). This second jury based its

decision to impose the death sentence on its finding beyond a reasonable doubt that "(t)he offense of murder was outrageous, wanton, vile and horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, and aggravated battery to the victim." (Tr.-2 at 304). See Ga. Code Ann. §27-2534.1(b)(7) and (c). The second sentencing jury did not find that the murder was committed while the offender was engaged in the commission of rape.

This court has recognized that "(e)ven if the first trial is not completed, a second prosecution may be grossly unfair" because successive prosecutions increase the emotional burden on the defendant and may significantly enhance the risk of conviction by allowing the prosecution to refine its proof. Arizona v. Washington, 434 U.S. 497, 503-504, and note 14 (1978). "Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Id. at 505. Although the issue at the second trial was punishment, not guilt, petitioner was, plainly, placed in jeopardy of life. Had the second jury been limited to consideration of the statutory aggravating circumstance charged in the first trial, it could not have sentenced petitioner to death on the basis of its stated findings.

Petitioner submits that it was a violation of the Fifth Amendment's ban against double jeopardy for the prosecution to present its sentencing case to the second jury based on a statutory aggravating circumstance that had not been established by the evidence in the first

sentencing trial. If the evidence presented at the first sentencing hearing was inadequate to require the judge to charge the jury on the additional aggravating circumstance, the prosecution should not be entitled to a second chance to prove beyond a reasonable doubt the existence of this aggravating factor. See Bullington v. Missouri, 451 U.S. 430 (1981). By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, the State explicitly requires the jury to determine whether the prosecution has "proved its case." Id. at 444. The State received "one fair opportunity to offer whatever proof it could assemble;" it is not entitled to another. Id. at 446. See generally Burks v. United States, 437 U.S. 1 (1977); Price v. Georgia, 398 U.S. 323 (1970); Green v. United States, 355 U.S. 184 (1957).

Petitioner also submits that the proceedings in which he was sentenced to death were fundamentally unfair and denied him due process of law. The prosecution gained an unfair advantage through the opportunity to present its case to a second jury with an additional theory to support imposition of the death sentence. It is not possible to be certain that the second jury's decision to impose death was not the result of its focusing on which of the circumstances was proved by the evidence rather than on whether either was proved beyond a reasonable doubt. See generally Price v. Georgia, 398 U.S. at 331. Prejudice to petitioner is indicated by the second jury's imposition of the death sentence on the broad and undefined circumstance, rather than on the narrowly defined circumstance that served as the basis for the first death sentence.

Finally, the second sentencing trial denied petitioner the procedural protection due a defendant in a death penalty case under Georgia law. As the Georgia Supreme Court recognized in petitioner's first appeal, the only aggravating circumstance as to which petitioner had been put on notice, as required by State law, was that charged in the first trial. Spraggins I, 243 S.E.2d at 23; see Ga. Code Ann. §§27-2503, 27-2534.1(b). Because the notice to which petitioner is entitled must precede his trial, no subsequent notice was adequate, under established procedure, to permit the prosecution to expand its case. Ga. Code Ann. §27-2503; Moss v. Georgia, 144 Ga. App. 226, 240 S.E.2d 773 (Ct. App. 1977). The jury's decision to impose the death penalty was, therefore, unlawful.

2. THE GEORGIA STATUTE, AS APPLIED IN THIS CASE, DID NOT INSURE AGAINST A CAPRICIOUS AND ARBITRARY DETERMINATION RESPECTING PETITIONER'S SENTENCE.

A. The Sentencing Jury Considered Irrevelant, Prejudicial and Inflammatory Information Without the Guidance of Clear Judicial Standards.

In Gregg v. Georgia, 428 U.S. 153 (1976), this court emphasized that when a human life is at stake there is a critical need to provide a jury with guidance and to ensure that relevant information is properly considered while irrevelant prejudicial information is excluded:

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. at 189.

The Court cautioned that "the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury;" the jury must be given guidance and direction in reaching its determination. Gregg v. Georgia, 428 U.S. at 192.

Petitioner was sentenced to death in proceedings that wholly failed to satisfy the concerns voiced in Furman v. Georgia, 408 U.S. 238 (1972) and Gregg, thereby creating a grave risk that the sentence was imposed in an arbitrary and capricious manner. The jury that sentenced petitioner was permitted to consider inflammatory evidence, and improper, prejudicial statements, without any standards to limit or direct its use of this information. Over the objection of defense counsel, the sentencing court allowed the prosecution to introduce into evidence and to display to the jury several photographs that graphically depicted the wounds suffered by the victim. (Tr.-2 at 133-134, 196-200). There was extensive testimony in the record as to the nature of the crime and the condition of the body (Tr. -2 at 131-132). The pictures were, therefore, not necessary to depict the crime and could serve no legitimate purpose. Rather, they could have served only to evoke feelings of revulsion and contempt in jurors unaccustomed to the spectacle of murder victims. The introduction of this evidence created a significant danger that the jury would be unduly prejudiced and incapable of reaching a reasoned decision.

Of further prejudicial impact were various comments and statements made by the prosecutor. Mr. Lee examined the petitioner on the issue of prior convictions as follows:

> Q. So you are kind of guy who goes to trial when you are not guilty but gets found guilty, isn't that right?
>
> A. Yes, but if you can recall in this case right here they never give me no chance to say whether I was or wasn't.
>
> Q. But you were found guilty?
>
> A. They gave me a year.
>
> Q. You didn't serve a year, did you?
>
> A. I would have.
>
> Q. They cut you loose--how long did you serve?
>
> A. Four months.
>
> Q. Four months isn't a year, is it?
>
> A. Well, that ain't my fault.
>
> Q. They always turn you loose, don't they, when you go in?
>
> A. They never have turned me loose every time I was up there. I done my time.

(Tr.-2 at 242-243). The prosecutor's questions undoubtedly served the intended purpose -- to alert the jury to the possibility that unless executed, petitioner would be "cut loose." Not only was the implication unwarranted, Georgia law specifically prohibits the prosecutor from making this argument to the jury. Ga. Code Ann. §27-2206 (1978). In further disregard of this prohibition, the prosecutor stated in his closing argument:

> He has been in jail so many times he can't even remember the number of them. Every time he

> gets out and goes and does something else. You want that to happen here? How would you feel being at your house one night looking out your window and seeing Eddie Spraggins walking up to your front door? If that wouldn't make cold terror run through your heart, I want to know what would. This man needs to be put where he can't do anything to anybody else again and the only way, the only way to be sure of that is recommend the death penalty.

(Tr.-2 at 281-282). At this point defense counsel moved for a mistrial. The trial court denied the motion, instructing the jury not to consider whether the defendant would be considered for parole. Obviously, the effect of this admonition must be assumed to have been negligible.

The impact of the prosecutor's statements, in conjunction with the introduction of the inflammatory pictures, was to arouse the jury's fear and prejudice. This appeal to the juror's sense of terror and outrage prevented a reasoned determination, based on relevant evidence and considerations.

The risk of an arbitrary and capricious decision was, thus, extremely grave; this risk was augumented by the judge's failure to provide the jury with standards to guide its use of the information relevant to the imposition of the sentence. The judge instructed the jury on the use of the evidence as follows:

> In reaching your determination, you are authorized to consider all of the evidence received by you in open court.
>
> You are authorized to consider all the facts and circumstances of the case.

(Tr.-2 at 296). The judge's abandonment of his duty to provide guidance left the jury free to exercise its unbridled discretion in sentencing petitioner to death.

B. Automatic Sentence Review by the Supreme Court of Georgia was Inadequate to Protect Against the Capricious, Arbitrary and Unconstitutional Imposition of Petitioner's Death Sentence.

In upholding Georgia's death penalty statute in Gregg, this Court focused on the automatic appeal to the Georgia Supreme Court as an important additional safeguard against the arbitrary and capricious imposition of the death penalty. 428 U.S. at 198, 204-206. Reliance on the automatic review process is misplaced; the Georgia Supreme Court's review of petitioner's death sentence did not and could not ensure that jury discretion was controlled by clear and objective standards so as to eliminate the risks of arbitrary and capricious action.

Because the statutory aggravating circumstance found by the jury is hopelessly vague, there could be no meaningful review to determine whether the evidence supported the jury's finding, as is required by statute. Ga. Code Ann. §27-2537(c)(2). The court's opinion, predictably, failed to elaborate on its conclusion that the jury's finding was supported by the evidence. Spraggins II, 252 S.E.2d at 622.

The court is also required under the sentence review statute to consider whether the sentence was imposed under the influence of passion or prejudice. Ga. Code Ann. §27-2537(c)(1). In one conclusory statement, without the basis for its conclusion, the Georgia Supreme Court dismissed this possibility. 252 S.E.2d at 622.

The court's citation to similar cases in which the death penalty was imposed to support its imposition in this

case is of no value in protecting against its random use. The cases cited by the court are similar in that they involve murder convictions; however, presumably in any case in which the defendant is convicted of murder the cases cited would support imposition of a death sentence. See id. at 623.

It is apparent from the summary nature of the Georgia Supreme Court's opinion in this case, that the automatic review afforded a defendant under this statute provides only the illusion of protection against arbitrary and capricious imposition of the death penalty.

3. NO JURY HAS EVER VOTED TO SENTENCE PETITIONER ON THE BASIS OF A CLEARLY DEFINED STATUTORY AGGRAVATING CIRCUMSTANCE, THEREFORE DEPRIVING HIM OF HIS SIXTH AMENDMENT RIGHTS

A. The Georgia Supreme Court Improperly Acted as a Sentencing Agent by Reimposing the Death Sentence After Redefining the Statute.

With respect to petitioner's first petition for a writ of certiorari, this Court remanded his case "for further consideration in light of Godfrey v. Georgia", 446 U.S. 420 (1980), but did not instruct the Georgia Supreme Court to put the matter before a newly convened sentencing jury. Mr. Justice Marshall's concurrence in Godfrey did suggest that a trial jury should be called:

> "[I]t is not enough for a reviewing court to apply a narrowing construction to otherwise ambigious statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channelled and guided by clear, objective, any specific standards."

Godfrey v. Georgia, 446 U.S. at 436 (emphasis in original). Mr. Justice Stewart's opinion for the Godfrey plurality, on

the other hand, could be read to imply -- though it did not hold* -- that if "the Georgia Supreme Court can be said to have applied a constitutional construction" of subsection (b)(7), Godfrey v. Georgia, 446 U.S. at 428, any deficiency at the trial jury level could be overcome.

On remand in this case, the Georgia Supreme Court, sua sponte decided against convening a new sentencing jury and further refused to take briefs or oral argument on any matter regarding petitioner's case. Simply holding that petitioner's

> "[jury was] authorized to find, consistently with the United States Supreme Court's holding in Godfrey, that beyond a reasonable doubt the appellant's murder of the victim was outrageously or wantonly vile, horrible or inhuman."

Spraggins v. State, 271 S.E.2d at 830 (emphasis added), the Georgia Supreme Court reimposed the death sentence.

That disposition of the remand was improper, however, since it effectively deprived petitioner of a trial by a jury that was actually given guidance about the meaning of subsection (b)(7) of the Georgia statute. That subsection permits the jury to recommend a death sentence if they find that the murder was aggravated in that it was:

> "outrageously and wantonly vile, horrible an inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim."

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* The plurality insisted that "if a State wishes to authorize the capital punishment...[i]t must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. at 428.

While it is true that in light of Godfrey and subsequent decisions by the Georgia Supreme Court, subsection (b)(7) has acquired some shape and texture, no trial jury has had the opportunity to consider petitioner's case in that crafted posture. Thus, it is "impossible for the Georgia Supreme Court to say whether a particular jury...so exercised its discretion", Godfrey v. Georgia, 446 U.S. at 437 (Marshall, J., concurring), and applied a constitutionally limited interpretation to (b)(7). Nothing in the sentencing instruction given petitioner's jury

> "implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed."

Godfrey v. Georgia, 446 U.S. at 428.

This Court has repeatedly held that no criminal sentence may be based merely on appellate speculation that a jury, faced with two alternative theories, one of which is unconstitutional, might have acted on a constitutional basis.* This principle has been observed in death cases, where the Court has insisted that all "doubts...should be resolved in favor of the accused." Andres v. United States,

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* Stromberg v. California, 283 U.S. 359, 268 (1931), Williams v. North Carolina, 317 U.S. 287, 291-93 (1942), Cramer v. United States, 325 U.S. 1, 36 n.45 (1945), Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949). Yates v. United States, 354 U.S. 298, 311-12 (1957), Gregory v. Chicago, 394 U.S. 111, 113 (1969), Street v. New York, 394 U.S. 576, 586-87 (1969), Bachellar v. Maryland, 397 U.S. 564, 569-71 (1970), Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam), Sandstrom v. Montana, 442 U.S. 510, 526 (1979), Chiarella v. United States, 445 U.S. 222, 237 N.21 (1980).

333 U.S. 740, 752 (1948); accord, Calton v. Utah, 130 U.S. 83, 86-87 (1889). Without assurance that the jury which sentenced the petitioner did so on the basis of a statute carefully fashioned to prevent arbitrary and capricious decisions, the petitioner's sentence to death should not have been reimposed.*

B. The Jury Which Sentenced Petitioner Was Given License to Apply the Statute Subjectively and Capriciously

In Gregg v. Georgia, 428 U.S. at 201, this Court considered the question of whether Georgia's seventh statutory aggravating circumstance was "so broad that capital punishment could be imposed in any murder case." The Court, obviously expecting future definition of this provision, concluded that:

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But the language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

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* The Georgia Supreme Court, acting on its own, could not constitutionally reimpose such a sentence simply from its own review of the trial record. "To conform to due process of law, petitione[r] [was] entitled to have the validity of his [conviction] appraised on consideration of the case as it was tried and as the issues were determined in the trial court". Cole v. Arkansas, 333 U.S. 196, 201 (1948); accord, Chiarella v. United States, supra, 445 U.S. at 237; Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). This "fundamental princip[e] of procedural fairness appl[ies] with no less force at the penalty phase of a trial in a capital case than...in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349 (1977)", Presnell v. Georgia, 439 U.S. 14, 16 (1978). The Georgia Supreme Court's attempt to reassess petitioner's sentencing issues, relying only upon a cold record, and in absence of statutory authority, plainly denied petitioner the due process of law.

Unfortunately, contrary to the Court's expectations, no such definition was forthcoming from the Georgia Supreme Court until Godfrey v. Georgia, supra. Before that decision, juries, virtually unguided by the courts of Georgia,* have found that the seventh aggravating circumstance obtained in cases as diverse as Banks v. State, 237 Ga. 325, 227 S.E. 2d 380, 382 (1976), cert. denied, 430 U.S. 975 (1977), where the firing of two gunshots into a victim found to constitute torture and depravity of mind,** and Thomas v. State, 240 Ga. 393, 242 S.E. 2d 1 (1977), where the victim was shot five times in the head, beaten with a shovel and hammer and buried alive.

Besides its objectionable breadth, Georgia's seventh aggravating circumstance, unrefined as it is, puts a premium on the introduction of inflammatory evidence. Gruesome and detailed testimony accompanied by flagrant exhibits acquires a heightened significance inappropriate to the objective and rational judgment which must inform the decision of whether a human life should be taken or spared. For instance, as discussed above, the admission into evidence of photographs which graphically depicted former testimony had no objective value, its only purpose was

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* The sentencing trial judge in peitioner's case made no attempt to define the seventh statutory aggravating circumstance in his instructions to the jury. (Appendix E)

** Apparently, where death is not simultaneous with the first intrusion of the victim's body, juries in Georgia are free to conclude that torture was entailed. See also, Morgan v. Georgia, 241 Ga. 485, 246 S.E. 2d 198 (1978), where one gunshot fired into the head of the victim was found to constitute the seventh statutory aggravating circumstance.

to elicit in the jury a visceral feeling of repulsion responsive to such vague standards as "wanton" and "vile."* Because this statutory standard, in its current undefined state, invites the death sentence as a function of inflammatory evidence, petitioner submits that it unconstitutional in that it does not in fact insure against the "wanton" and "freakish" imposition of the death penalty.

4. THE WRITTEN CHARGE OF THE TRIAL JUDGE EFFECTIVELY NULLIFIED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES

A. The Written Charge of the Trial Judge Failed to Inform the Jury that Even if They Found Aggravating Circumstances, They Could Recommend a Life Sentence.

As directed by statute the sentencing trial judge in this case provided the jury with a written charge to be taken into the jury room. Ga. Code Ann. §27-2534.1(c).** This written charge set forth two options which the jury might have selected after deliberation. The first option was stated as follows:

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* Indeed the trial judge admitted as much when he overruled the objections of petitioner's counsel to admission of the photographs. The judge said:

> Further, the state contends that murder was outrageous and wanton and vile, horrible, depravity of mind on the part of the defendant or aggravated battery on the victim so, I think, it is necessary these pictures be viewed by the jury in order that they can make up their minds as to what sentence this defendant is to receive upon the sentencing phase of the trial.

** The first sentence of Section 27-2534.1(c) reads:

> "The statutory instruction as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation."

> If you find that there was one or more of these aggravating circumstances (listed immediately above in the charge) established beyond a reasonable doubt, you may fix punishment at death.

The second option contained in the charge was:

> If you do not find that there was one or more aggravating circumstances, then the form of your verdict would be, "We, the Jury, fix punishment at life."

Although this charge was identical to the one disallowed by the Georgia Supreme Court in petitioner's first trial, the trial judge once again submitted the written charges to the jury in the resentencing hearing (Tr.-2 at 298).

Petitioner submits that by limiting the jury to these two options, the judge eliminated the possibility that the jury would consider mitigating circumstances and recommend a life sentence even if aggravating circumstances were present.

In the five death sentence cases decided by this Court in July, 1976, a consistent theme was that state death statutes must establish a scheme that allows the jury to consider and evaluate freely all mitigating circumstances in passing sentence.* The Court's more recent decision in Lockett v. Ohio, 438 U.S. 586 (1978), affirms that principle. At various places throughout these decisions, this Court approvingly referred to the Georgia statute, Code Ann. §27-2534.1, as exemplifying a state statute which comprehends the necessity of allowing the trier of fact to

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* Gregg v. Georgia, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas; 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280, Roberts v. Lousiana, 428 U.S. 325.

consider all mitigating circumstances.* See, e.g., Lockett v. Ohio, 538 U.S. at 606, Jurek v. Texas, 428 U.S. at 271.

In several decisions, the Georgia Supreme Court has considered the statute as applied by the lower Georgia courts and has set guidelines intended to ensure that the jury will consider mitigating circumstances and fashion their sentences accordingly. For instance, in Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977), the Georgia Supreme Court overturned a death sentence on the grounds that the trial judge failed to inform the jury that "they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance." 240 S.E. 2d at 40. Explaining its decision in terms of an obligation to permit consideration of mitigating circumstances, the Georgia Supreme Court wrote:

> Our system for deciding whether a death sentence is to be given requires the jury to consider two issues in the sentencing phase. First, the jury must consider if the state has proven the existence of at least one statutory aggravating circumstance (Code Ann. §27-2534.1(b)(1-10)), beyond reasonable doubt. Second, if one of these circumstances is found, the jury must then consider the mitigating and aggravating circumstances relevant to the defendant and determine whether the death penalty is appropriate in this case.

240 S.E. 2d at 40-41. It is thus clearly the opinion of the

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* Section 27-2534.1(b) reads:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence....

Georgia Supreme Court that unless the jury is specifically informed that it may impose a sentence for life even if a statutory aggravating circumstance is present, effective consideration of mitigating circumstances will be foreclosed. See also, Hawes v. State, 240 Ga. 327, 240 S.E. 2d 833 (1977). Such an automatic negation of mitigating circumstances would of course rise to unconstitutional dimensions.

As noted in the factual summary above, the first Georgia Supreme Court decision involving the petitioner followed the Fleming and Hawes decision and set aside the death sentence. In contrast, in the second sentencing decision, the Georgia Supreme Court specifically found that the Fleming-Hawes infirmities did not obtain. Spraggins II, 252 S.E.2d at 622. Presumably relying upon parts of the judge's oral charge (Appendix D, hereto), the Georgia Supreme Court obviously believed that the jury was sufficiently informed that a death sentence was not inevitably to derive from a finding of aggravating circumstance. Petitioner submits that in light of the written charge actually carried by the jury into its final deliberations, the Georgia Supreme Court was incorrect in its conclusion that the oral charge was sufficiently salient to instruct the jury on the Fleming-Hawes constitutional issue.

Petitioner appreciates that the jury deliberation process is largely inscrutable. For the most part, the devices which sway juries or the tactics which pass beyond them are matters of mere speculation to observers. Nevertheless, the impact of a written charge carried into the

jury room as a tangible item of authoritative source cannot be minimized. To assume that several sentences in an earlier oral charge will cause the jury to deviate from the instructions of the written word is both naive and, more importantly, improper. Petitioner submits that the jury which sentenced him to death was effectively forclosed from consideration of mitigating circumstances because the judge's written charge failed to inform them that even if they found an aggravating circumstance, a life sentence could be imposed. Accordingly, petitioner was denied his constitutional right to due process of law.

Moreover, because the written charge overshadowed the oral charge and firmly guided the jury, the statute, in the understanding of the jury, would tend to acquire a mandatory character. For, once the jury found on aggravating circumstance, there was, under the judge's written instructions, no explicit option to death; and although the language in the written charge is technically permissive (the charge says "may recommend"), the jury members are not trained in law and their interpretation may not have been so refined. To the extent that this written charge turned the Georgia statute into a mandatory death statute, petitioner's constitutional rights were violated. See, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976).

B. The Written Charge of the Trial Judge Failed to Instruct the Jury that They Could Consider Mitigating Circumstances.

The judge's written charge, discussed above, also contained the following instruction concerning the scope of the jury's inquiry:

I charge you that you may look to see if there was any one or more of the following aggravating circumstances:

(1) The offense of murder was committed while the offender was engage in the commission of an additional capital felony, to wit: the rape of Frances Coe.

(2) The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity or mind on the part of the defendant, or an aggravated battery to the victim.

The written charge did not advise the jury that they could consider any mitigating circumstances.

With respect to the absence in the written charge of any reference to mitigating circumstances, the Georgia Supreme Court evidently believed, as suggested above, that the judge's oral charge regarding mitigating circumstances satisfied the constitutional requirements. If the Georgia Supreme Court did not so believe, there is no way to reconcile the decision in petitioner's case with the holding in Hawes v. State. Petitioner accordingly reiterates the points raised above regarding the respective influence on the jury of any oral and written charge and asks the Court to consider whether or not the sentencing jury was ultimately given sufficient notice and opportunity to consider mitigating circumstances.

In addition, the petitioner submits that the written charge was improper and unconstitutional because by its application it violated the Georgia statute, found lawful on its face by this Court in Gregg, which calls for an identity of content in the oral and written charges. Ga. Code Ann. §27-2534.1(c). That section requires that the

judge in the sentencing trial provide the jury "in charge and in writing" (emphasis added) with "the statutory instructions as determined by the trial judge to be warranted by the evidence."* The statutory language does not leave room for a significant disparity between the oral and written charges, particularly where the actual written charge omits any mention of mitigating circumstances. Such disparity could only serve to confuse the jury as to which factors it is required to consider and thus confounds the statute's finely-tuned guidance that this Court found so salutary in Gregg. Petitioner therefore submits that the exact terms of the statute which support its constitutionality by unqualifiedly guaranteeing consideration of mitigating circumstances, have been nullified in application by the disparity in the judge's oral and written charges.

5. FAILURE OF PETITIONER'S COUNSEL TO PROVIDE EFFECTIVE ASSISTANCE VIOLATED HIS SIXTH AMENDMENT RIGHTS.

Petitioner is entitled to reasonably effective assistance of counsel at both the guilt-innocence and sentencing stages of his trial under Section 2-101 and 2-111 of the Constitution of 1976 of the State of Georgia, and under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States. The Sixth Amendment

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* The "statutory instructions" referred to in Section 27-2534.1 (c) have already been cited in the petition, at p. 2. They are that "he (the judge) shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances....

right to counsel is satisfied only when an accused is provided "effective counsel" -- that is, "counsel reasonably likely to render, and rendering, reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638, 639, 203 S.E.2d 515, 517 (1974). Moreover, in capital cases, the Eighth Amendment, together with the Sixth and Fourteenth, establish a particularly high standard of reasonableness and require that a convicted defendant's counsel be subject to the strictest scrutiny. See e.g., Blake v. Zant, 513 F. Supp. 772, 779-781 (S.D. Ga. 1981); Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980); Smotherman v. Beto, 276 F. Supp. 579, 586 (N.D. Tex. 1967). See generally, Powell v. Alabama, 287 U.S. 45, 71-72 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Roberts v. Dutton, 358 F.2d 465, 471 (5th Cir. 1966). Indeed, this heightened scrutiny of defense counsel's services is one of the very conditions under which the Supreme Court has allowed capital punishment to be imposed. Woodson v. North Carolina, 428 U.S. 280, 306 (1976) (plurality opinion). As one court stated:

> The penalty of death is qualitatively different from a sentence of imprisonment.... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the jury's determination that death is the appropriate punishment in a specific case.... This necessary reliability is undermined unless it appears that the defendant received the competent assistance of an attorney acting as a diligent, conscientious advocate for his life.

State v. Myles, 389 So.2d 12, 30 (La. 1980) (citations omitted; emphasis added).

Petitioner submits that counsel was ineffective in failing to seek an independent psychiatric examination of his client and to introduce any testimony on behalf of his client during the special Plea of Insanity Hearing conducted. At both trials petitioner's court-appointed attorney neglected to conduct adequate voix dire examination of prospective jurors. At petitioner's resentencing trial the attorney failed to inquire of prospective jurors as to their knowledge of the first trial or as to its outcome. During the closing argument of the prosecution, the court-appointed counsel failed to object to statements made by the District Attorney in which the law was misstated, and which led the jury to believe that if petitioner was convicted on only one count of the indictment, the maximum penalty he could receive would be life imprisonment. (Tr.-1 at 124-125). During the closing argument by the petitioner's court-appointed attorney at the resentencing trial, the petitioner's attorney told the jury that he did not ask to represent the petitioner and was representing him only because he was court appointed. Further, counsel alluded to the fact that the jury's decision would be reviewed by the Georgia Supreme Court on appeal. (Tr.-2 at 289). If such comment had been made by the prosecution, it would have been grounds for a mistrial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Georgia Supreme Court, denying a writ of habeas corpus, herein.

Respectfully submitted,

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140 Broadway
New York, New York 10005

Counsel for Petitioner

of Counsel:

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Howard S. Ockman
Mary Jo Eyster

LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-5084

RECEIVED
JUL 20 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

EDDIE SPRAGGINS,

Petitioner,

-against-

WALTER D. ZANT, Warden,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Eddie Spraggins, by his undersigned counsel, respectfully requests leave to file the Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of fees and costs, and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court. Mr. Spraggins' affidavit in support of this motion is attached.

Attorney for Petitioner
Eddie Spraggins

140 Broadway
New York, New York 10005
(212) 269-1100

Dated: New York, New York
July 16, 1982

RECEIVED
JUL 20 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

EDDIE SPRAGGINS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, EDDIE SPRAGGINS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No X

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No X

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No X

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None X

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

X Eddie Spraggins

EDDIE SPRAGGINS

STATE OF GEORGIA
COUNTY OF _____

SUBSCRIBED AND SWORN TO
before me this the 20 day of May, 1982.

Notary Public

My Commission expires:
6-20-83

Application No. 1950

SUPREME COURT OF GEORGIA

ATLANTA, February 17, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

EDDIE SPRAGGINS V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

EDDIE SPRAGGINS,	:	
	:	
PETITIONER	:	
	:	
VS.	:	
	:	HABEAS CORPUS
WALTER D. ZANT,	:	FILE NO. 5195
WARDEN, GEORGIA	:	
DIAGNOSTIC AND	:	
CLASSIFICATION	:	
CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Meriwether County. Petitioner was convicted of murder and rape. He received a death sentence for murder and a life sentence for rape. The Supreme Court affirmed both convictions but vacated the death sentence for murder and required a new trial solely on the issue of punishment for murder. Spraggins v. State, 240 Ga. 759 (1978). Upon retrial Petitioner again received a death sentence, which sentence was affirmed by the Supreme Court. Spraggins v. State, 243 Ga. 73 (1979). The Supreme Court of the United States vacated the death sentence and remanded the case for further consideration in light of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Upon reconsideration the Supreme Court reaffirmed the death sentence. Spraggins v. State, 246 Ga. 432 (1980). Certiorari was denied by the Supreme Court of the United States. Spraggins v. Georgia, _____U.S._____, 68 L.Ed.2d 312 (1981).

The Petition contains 19 numbered counts which allege substantive claims for relief (1-19). Evidence and argument have been presented on only 7 points, however, and the Court will only address these claims for relief (1, 2, 4, 7, 9, 14, 18). All unsupported allegations will be deemed abandoned and without merit.

The record in this case consists of the transcript of the proceedings before this Court on November 9, 1981, and the transcripts and records of Petitioner's trials in the Meriwether County Superior Court.

1.

In count 1, Petitioner claims he was denied his Sixth Amendment right to effective assistance of counsel at both trials and on appeal.

FINDINGS OF FACT

Petitioner was represented at both trials and on appeal by Vernon Belcher. (H.T. 5-6). Mr. Belcher has been a member of the Bar since 1941. (H.T. 14). Counsel estimated that 10-15% of his practice has been

in the area of criminal law. (H.T. 15). He had handled numerous capital cases prior to Petitioner's. (H.T. 15, 21).

Counsel testified that he conferred with Petitioner several times, prior to both the preliminary hearing and trial. (H.T. 7-8, 15-16). He represented Petitioner at the preliminary hearing. (H.T. 15). Counsel talked with Petitioner's family, went to the scene of the crime, talked with investigating officers, canvassed the area to see if there were evidence he did not know about, obtained Petitioner's school records, and made every effort he could think of to investigate. (H.T. 8).

The district attorney gave Counsel a copy of his entire file, including a list of witnesses, Petitioner's statements, and lab reports. (H.T. 15-16). Counsel discussed a possible plea since Petitioner had freely admitted his guilt, but the prosecutor was not receptive to the idea. (H.T. 21).

Among the motions Counsel filed prior to the first trial was a motion for a psychiatric examination, which was granted. (R. 1st. Tr. 1-6). Counsel did not move for an independent psychiatric exam because he had no reason not to rely on the report from Central State Hospital. (H.T. 18, 20). Furthermore, he did not think the trial judge would have granted the request. (H.T. 20). Counsel did file a special plea of insanity and presented one witness, but the special

jury found Petitioner competent to stand trial. (R. 1st Tr. 17-19, T.1st. Tr. 3-8).

At Petitioner's first trial, Counsel made an opening statement though it was not recorded (T. 1st Tr. 2); cross-examined witnesses (T. 1st Tr. 30; 36; 46; 57; 60; 61; 73; 83; 90); made motions (T.1st Tr. 52;122); offered three witnesses during the guilt/innocence phase, including Petitioner (T. 1st. Tr. 98; 102; 108); and made closing arguments in both the guilt/innocence and sentencing phases. (T. 1st. Tr. 126-130;161, 175-176).

At Petitioner's resentencing trial, Counsel filed motions (R. 2d Tr. 8-16); made an opening statement (T. 2d Tr. 83-86); cross-examined witnesses (T. 2d Tr. 94; 96; 102; 108; 116; 120; 127; 149; 153; 161; 183; 192; 194; 196; 202; 205); made motions (T. 2d. Tr. 126; 282; 304); presented two witnesses including Petitioner (T. 2d. Tr. 207; 225); and made a closing argument (T. 2d. Tr. 288-295).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's Counsel easily meets this test. Mr. Belcher was experienced in the trial of criminal

cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner claims Counsel ineffectively handled voir dire at the resentencing trial in failing to ask prospective jurors about their knowledge of Petitioner's first trial and its outcome. A reading of the voir dire transcript indicates the district attorney had already questioned the prospective jurors on this subject. (T. 2d. Tr. 3-4; 13-14; 22-23; 34-35; 43-44). As a result, three people were excused because of their lack of impartiality or their previous knowledge of the case. (T. 2d. Tr. 27; 44; 46-47).

Petitioner has also claimed Counsel was ineffective for not requesting an independent psychiatric exam. Yet, Petitioner has made no showing that such an exam would have been helpful or would have differed from the Central State evaluation of Petitioner's competency. The Court cannot conclude Counsel was ineffective for this reason.

Accordingly, the allegation in Count 1 is found to be without merit.

2.

In count 2, Petitioner contends that the submission of a statutory aggravating circumstance at his resentencing trial, which was not submitted at his first trial, violated

the Fifth Amendment ban against double jeopardy and his Fourteenth Amendment right to due process of law.

FINDINGS OF FACT

At Petitioner's first sentencing trial, the State submitted one statutory aggravating circumstance, Ga. Code Ann. §27-2534.1(b)(2). (R. 1st. Tr. 24-25). The jury found its existence and imposed a death sentence (R. 1st. Tr. 26). On appeal, Petitioner's death sentence was vacated for defects in the trial court's instructions to the jury. Spraggins v. State, 240 Ga. at 763.

At the resentencing trial, the State introduced two statutory aggravating circumstances, Code Ann. §27-2534.1 (b)(2) and (b)(7). (R. 2nd. Tr. 6-7). The jury found the existence of the (b)(7) aggravating circumstance and imposed a death sentence. (R. 2d. Tr. 20).

CONCLUSIONS OF LAW

Petitioner relies upon Bullington v. Missouri, ____U.S.____, 101 S.Ct.____, 68 L.Ed.2d 270 (1981), to assert that the State was barred by the Fifth Amendment double jeopardy clause from introducing the (b)(7) aggravating circumstance at the resentencing trial because it was not sought at his first sentencing trial.

Bullington is distinguishable upon its facts from the case at bar in that "In Bullington there was a life sentence imposed at the first sentencing

procedure whereas in the instant case a death penalty was imposed. Therefore, the danger of repeated attempts by the State to wear a defendant down and obtain the desired result is not present." Godfrey v. State, ___ Ga. ___ (No. 37683, 37684, decided November 24, 1981), slip. op. at 5.

The Court in Godfrey held that the State is not limited to the aggravating circumstances relied upon at the first sentencing trial. "We do not agree that failure to submit aggravating circumstances which are raised by the evidence is an implied directed verdict of acquittal on these aggravating circumstances. Godfrey, supra, slip. op. at 6."

Under the rule announced in Godfrey, Petitioner's rights were not violated by the State's introduction of the (b)(7) aggravating circumstance at his resentencing trial.

Accordingly, the allegation in count 2 is found to be without merit.

4.

In count 4, Petitioner alleges that the written copy of the jury charge, which went out with the resentencing jury, was identical to the defective charge at Petitioner's first sentencing charge so that its use violated his Sixth, Eighth, and Fourteenth Amendment rights. Specifically, Petitioner

alleges that the copy did not point out that the jury could recommend a life sentence even if they found the existence of one or more statutory aggravating circumstances or specify mitigating circumstances.

FINDINGS OF FACT

The Supreme Court has already concluded that the trial court's instructions at Petitioner's resentencing trial were not defective. Spraggins v. State, 243 Ga. at 76.

CONCLUSIONS OF LAW

The "copy" of which Petitioner complains was not a complete copy of the trial court's charge but merely a guide to the jury in formulating its verdict as required by Code Ann. §27-2534.1(c). (Cf. R. 2d. Tr. 18-19). Written material furnished to the jury pursuant to §27-2534.1(c) is purely of a procedural nature and amounts to nothing more than a written formulation of the jury's potential verdicts. Collier v. State, 244 Ga. 553, 569 (1979); Collins v. State, 243 Ga. 291 (1979). There is no reason to assume the jury disregarded the trial court's oral instructions on aggravating and mitigating circumstances.

Accordingly, this allegation is found to be without merit.

7.

The Supreme Court has already concluded that

the closing argument made by the district attorney at the resentencing trial was within the permissible range afforded a prosecutor seeking the death penalty. Spraggins v. State, 243 Ga. at 74.

9.

In count 9, Petitioner challenges the constitutionality of the Ga. Code Ann. §27-2534.1(b)(7) statutory aggravating circumstance.

The (b)(7) statutory aggravating circumstance has been held to be constitutional. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d.398 (1980). Furthermore, the Supreme Court has expressly reaffirmed the jury's finding of the (b)(7) statutory aggravating circumstance in this case in light of Godfrey. Spraggins v. State, 246 Ga. at 434.

Accordingly, this allegation is found to be without merit.

14.

The Supreme Court has already concluded Petitioner's death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. Spraggins v. State, 243 Ga. at 76.

18.

In count 18, Petitioner attacks the appellate review process under the Georgia death penalty statute.

Georgia's death penalty statute has been held constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Furthermore, the Supreme Court has conducted its sentence review and determined Petitoner's death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor nor excessive or disproportionate. Spraggins v. State, 243 Ga. at 76.

Petitioner has not shown the sentence review in this case was improper or insufficient.

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations in the Petition having been found to be without merit, the Petition is denied.

SO ORDERED, this 4 day of January, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "... nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "No State shall... deprive any person of life, liberty, or property, without due process of law."

The following are those provisions of the Constitution of Georgia of 1976 that are involved in this case:

GA. CONST. art. I §2-101

No person shall be deprived of life, liberty, or property, except by due process of law.

GA CONST. art. I §2-111

Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel; shall be furnished, on demand, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded; shall have compulsory process to obtain the testimony of his own witnesses; shall be confronted with the witnesses testifying against him; and shall have a public and speedy trial by an impartial jury.

Appendix B

The following are those provions of the Georgia Code Annotated that are involved in this case:

27-2206 Counsel prohibited from arguing possibility of executive clemency; mistrial for violation of rule

No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole, or clemency of any nature may be granted by the Governor, State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency. If counsel for either side in a criminal case should so argue to the jury, opposing counsel shall have the right to immediately request the court to declare a mistrial; and in which case, it shall be mandatory upon the court to declare a mistrial; and upon failure so to do, same shall constitute reversible error.

This section shall be construed as setting forth regulations in addition to those provided for in section 24-3319 and section 81-1009.

(Acts 1955, pp. 191, 192.)

27-2503 Presentence hearings in felony cases

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed.

In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the

evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

(Acts 1974, pp. 352, 257.)

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated

battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be

in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentance of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred

to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(Acts 1973, pp. 159, 165.)

wife, and in ordering him to pay an indebtedness for a stove purchased for the wife's benefit.

This court will not control the discretion of the trial judge in awarding temporary alimony and attorney fees unless there is a manifest abuse of discretion. *Johnson v. Johnson*, 236 Ga. 647, 225 S.E.2d 36 (1976); *Wilbanks v. Wilbanks*, supra. After reviewing the record of the hearing, we find evidence to support the award of temporary alimony to the wife, and no abuse of discretion.

Judgment affirmed.

All the Justices concur.



243 Ga. 73

SPRAGGINS

—v.

The STATE.

No. 34289.

Supreme Court of Georgia.

Argued Jan. 8, 1979.

Decided Feb. 6, 1979.

Following remand for new trial on issue of punishment to be imposed following conviction for rape and murder, 240 Ga. 327, 240 S.E.2d 833, the Meriwether Superior Court, Jackson, J., entered death sentence on jury verdict, and defendant appealed. The Supreme Court, Bowles, J., held that: (1) closing argument by district attorney, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was within permissible range afforded to prosecuting attorney who is seeking death penalty; (2) written list of aggravating circumstances was properly given to jury to be carried with them into jury room; (3) verdict was not improperly prepared in open court under instructions of district attorney; (4) record demonstrated that sentence of death was not imposed under influence of passion, prejudice or any other arbitrary factor; (5) evidence supported jury's finding of aggravated circumstance, and (6) sentence of death was not excessive or disproportionate considering both crime and defendant.

Affirmed.

1. Criminal Law ⇐723(1)

Closing argument by district attorney in murder-rape prosecution, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was within permissible range afforded to prosecuting attorney who is seeking death penalty. Code, § 27–2206.

2. Criminal Law ⇐730(14)

Even if closing argument by district attorney in murder-rape prosecution, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was improper, such impropriety was cured by trial judge's corrective instruction. Code, § 27–2206.

3. Criminal Law ⇐858(1)

In murder-rape prosecution, written list of aggravating circumstances was properly given to jury to be carried with them into jury room. Code, § 27–2534.1(c).

4. Criminal Law ⇐857(1)

Verdict in murder-rape prosecution was not improperly prepared in open court under instructions of district attorney, where foreman stated that the verdict had been reached in jury room, where, because verdict form had not been completed in accordance with court's instructions, district attorney handed verdict form back to foreman and instructed her to strike out the inapplicable verdict, where the court reiterated such instruction to the foreman, and where the jurors were polled and each answered that verdict was his own, freely and voluntarily given.

5. Criminal Law ⇐768(1)

Jury instruction in murder-rape prosecution, that "It is not wise to immediately express a determination or insist upon a certain verdict," did not encroach upon the jury's deliberation function.

6. Homicide ⇐354

Record in murder-rape prosecution demonstrated that sentence of death imposed upon defendant was not imposed under influence of passion, prejudice or any other arbitrary factor. Code, § 27-2537(c)(1).

7. Homicide ⇐354

Evidence in murder-rape prosecution in which death penalty was imposed supported jury's finding of an aggravating circumstance, viz., that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on part of defendant or aggravated battery to the victim.

8. Criminal Law ⇐193

No double jeopardy violations occurred, in resentencing trial on convictions of rape and murder, by submission to jury of list of aggravating circumstances to be considered.

9. Criminal Law ⇐1206(2)

Sentence of death imposed in murder-rape prosecution was not excessive or disproportionate considering both crime and defendant. Code, § 27-2537(c)(3).

A. Vernon Belcher, Greenville, for appellant.

Arthur K. Bolton, Atty. Gen., John W. Dunsmore, Jr., Asst. Atty. Gen., William F. Lee, Jr., Dist. Atty., for appellee.

BOWLES, Justice.

The appellant, Eddie Spraggins, was indicted by a grand jury in Meriwether County for the January 31, 1977, rape and murder of Frances Coe. He was tried by a jury and found guilty of both offenses.

In *Spraggins v. State*, 240 Ga. 759, 243 S.E.2d 20 (1978), appellant's conviction and life sentence for rape were affirmed. However, because the court in its sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (*Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977)); and failed to inform the jury that they were authorized to consider mitigating circumstances, as required by Code Ann. §§ 27-2534.1(b) and 27-2534.1(c), (*Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977)), appellant's sentence of death for murder was reversed and a new trial ordered on the issue of punishment.

Upon resentencing, the jury found that the murder was "outrageously and wantonly vile, horrible, and inhuman in that it involved torture and depravity of mind on the part of the defendant, or an aggravated battery to the victim." Code Ann. § 27-2534.1(b)(7). A verdict was returned for the death penalty and appellant was sentenced to death.

The case is here on direct appeal and for mandatory review of the death sentence imposed. Code Ann. § 27-2537. The facts surrounding the murder and rape of Frances Coe are set out in *Spraggins v. State*, supra, and its companion case, *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978).

1. In his first enumeration of error, appellant complains that the trial court erred in denying his motion for mistrial, made after the district attorney's request for the death penalty in closing argument. Appellant argues that the district attorney's statement violated Code Ann. § 27-2206, which forbids a prosecutor from arguing that a defendant may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole or clemency of any nature may be granted. Although the trial judge overruled appellant's motion for mistrial, he did instruct the jury not to consider whether, if given a life sentence, appellant might be paroled.

[1] We have reviewed the closing argument made by the district attorney and find it to be within the permissible range afforded to a prosecuting attorney who is seeking

the death penalty. *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383 (1979); *Mason v. State*, 236 Ga. 46, 222 S.E.2d 339 (1976); *Tamplin v. State*, 235 Ga. 20(4), 218 S.E.2d 779 (1975).

[2] Even assuming arguendo that the argument was improper, it was cured by the judge's corrective instruction. *Pryor v. State*, 238 Ga. 698(7), 234 S.E.2d 918 (1977). The trial judge did not err in refusing to grant appellant's motion for mistrial.

[3] 2. Appellant complains that it was error to give to the jury a list of aggravating circumstances put forth by the State to be carried with them into the jury room.

Code Ann. § 27-2534.1(c) requires that the trial judge give the statutory instructions warranted by the evidence to the jury in its charge and in writing. There was evidence to support the aggravating circumstances given to the jury in the charge and in writing. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); *Douthit v. State*, 239 Ga. 81(6), 235 S.E.2d 493 (1977). As the law requires that the written list of aggravating circumstances as charged by the court be given to the jury for use in its deliberations, there is no merit to appellant's second argument. The form given to the jury in this case complied with the law and conformed to the evidence.

[4] 3. Appellant complains that the jury prepared its verdict in open court under the instructions of the district attorney.

A review of the transcript shows that the jury reached its verdict in the jury room. The foreman announced, in open court, that a verdict had been reached. Because the verdict form, when handed to the district attorney, had not been completed in accordance with the court's earlier instruction, the district attorney handed the form back to the foreman, and instructed her to strike out one of the two verdicts which did not apply. The court reiterated this instruction to the foreman. No objection was made by appellant.

We find no error. The foreman stated that the verdict had been reached in the jury room. The jurors were polled, and each answered that the verdict was his own, freely and voluntarily given. No harm is shown to have resulted from the instruction given.

Appellant's third enumeration of error is without merit.

[5] 4. Appellant complains that the trial court infringed on the jury's exclusive authority by instructing that, "It is not wise to immediately express a determination or insist upon a certain verdict." We do not agree with appellant's contention.

The court's instruction did not encroach on the jury's deliberation function. Appellant's fourth enumeration of error has no merit.

[6] 5. Sentence Review. Our sentence review has included consideration of the aggravating circumstances found by the jury and the evidence introduced in court concerning the crime and the defendant. After a thorough review of the record and transcript, we conclude that the sentence of death imposed on Eddie Spraggins was not imposed under the influence of passion, prejudice or any other arbitrary factor. Code Ann. § 27-2537(c)(1).

[7, 8] The evidence supports the jury's finding of an aggravating circumstance, namely that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on the part of the defendant or an aggravated battery to the victim. No double jeopardy violations occurred in the court's submission to the jury of the list of aggravating circumstances to be considered on resentencing. *Redd v. State*, supra.

We have reviewed the instructions given by the trial judge on resentencing and find that they are not subject to the defects dealt with in our decisions in *Fleming v. State*, supra, and *Hawes v. State*, supra.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the cases listed in the

appendix support affirmance of the death penalty.

[9] Eddie Spraggins' sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant. Code Ann. § 27-2537(c)(3). The verdict is factually supported.

Judgment affirmed.

All the Justices concur.

APPENDIX

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Chenault v. State*, 234 Ga. 216, 215 S.E.2d 223 (1975); *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976); *Isaacs v. State*, 237 Ga. 105, 226 S.E.2d 922 (1976); *Dungee v. State*, 237 Ga. 218, 227 S.E.2d 746 (1976); *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976); *Young v. State*, 239 Ga. 53, 236 S.E.2d 1 (1977); *Gaddis v. State*, 239 Ga. 238, 236 S.E.2d 594 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978); *Finney v. State*, 242 Ga. 582, 250 S.E.2d 388 (1978); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979).



243 Ga. 91

WANSOR

v.

GEORGE HANTSCHO COMPANY, INC. et al.

No. 34453.

Supreme Court of Georgia.

Argued Jan. 16, 1979.

Decided Feb. 6, 1979.

In case involving question certified from United States Court of Appeals, Fifth Circuit, the Supreme Court, Undercofler, P. J., held that where product was manufactured in 1960–61, product was purchased and installed in 1961, Georgia Legislature amended statute in 1968 to overcome privity limitations on tort recoveries, product caused injury to individual in 1971 due to product's alleged defective condition, doctrine of strict liability in tort did not apply to product, since to apply 1968 statute, which created a new cause of action in Georgia applicable to manufacturer of any personal property sold as new property, to product sold in 1961 would violate applicable statute forbidding retrospective application of laws.

Certified question answered in negative.

Products Liability ⇐2

Where product was manufactured in 1960–61, product was purchased and installed in 1961, Georgia Legislature amended statute in 1968 to overcome privity limitations on tort recoveries, product caused injury to individual in 1971 due to product's alleged defective condition, doctrine of strict liability in tort did not apply to product, since to apply 1968 statute, which created a new cause of action in Georgia applicable to manufacturer of any personal property sold as new property, to product sold in 1961 would violate applicable statute forbidding retrospective application of laws. Code, §§ 102–104, 105–106.

Johnson, Ward, Stanfield, Lanham & Carr, Cullen M. Ward, Clark H. McGehee, Atlanta, for appellant.

N. Forrest Montet, David M. Leonard, Hurt, Richardson, Garner, Todd & Cadenhead, T. Cullen Gilliland, Atlanta, for appellees.

UNDERCOFLER, Presiding Justice.

The following question has been certified to this court from the United States Court

[12] 7. The jury sentenced Redd to death after finding him guilty of murder in the course of kidnapping with bodily harm to the victim, which is an aggravating circumstance authorizing the ultimate penalty under Code Ann. § 27-2534.1(b)(2). In Enumeration 10 Redd argues correctly that his death sentence must be set aside for failure of the trial court to make clear to the jury in his charge taken as a whole that they might in their discretion recommend a life sentence even if they found the existence of a statutory aggravating circumstance. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977); *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977). The lack of clarity in the charge was raised below by specific objection by Redd's attorney, but no recharge was made. Accordingly, the death sentence must be overturned and Redd must be resentenced, which also has the effect of mooting Enumerations 9, 11 and 12 which attack other aspects of the sentencing procedure.

Redd's conviction and life sentence for kidnapping are affirmed. His murder conviction is affirmed, but the sentence is set aside and a new trial is ordered on the issue of punishment for that offense.

Judgment affirmed in part and reversed in part.

All the Justices concur, except JORDAN, J., who dissents.

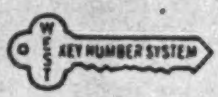
JORDAN, Justice, dissenting.

I dissent to Division 7 of the opinion in which the death sentence is set aside and a new trial ordered as to punishment. In my opinion the charge taken as a whole meets the requirement of the law.

On the punishment phase of the trial, the court charged the jury to "consider all of the evidence received by you in open court, in both phases of the trial. You are authorized to consider all the facts and circumstances of the case." The charge made it clear that the crimes for which the defendant had been found guilty were punishable by death *or* life, and that it was their duty to determine the penalty within the established limits. The court further correctly charged that "before you would be authorized to find a verdict fixing a sentence of death . . . , you must find evidence of statutory aggravating circumstances . ."

In my opinion this charge made it quite clear that the jury could consider all of the facts and circumstances of the case, including evidence in mitigation and aggravation, in order to arrive at the proper penalty and that they were authorized to fix the punishment at *either* death or life. The charge on aggravating circumstances did not mandate a sentence of death if such was found, but merely *authorized* the death penalty.

I think the jury fully understood its duties and prerogatives under the charge as given. I would affirm.



240 Ga. 759

Eddie SPRAGGINS

v.

The STATE.

No. 32605.

Supreme Court of Georgia.

Feb. 21, 1978.

Defendant was convicted before the Superior Court, Meriwether County, Joseph C. Jackson, J., of rape and murder, and he appealed. The Supreme Court, Hill, J., held that: (1) evidence was sufficient to sustain convictions; (2) GBI agent's voluntary testimony that defendant was known to have been drinking on night before offenses and that agent had learned that defendant "was the type [of] person * * * who got into fights. They had a bit of trouble with him periodically" was not so prejudicial that it could not be cured by certain instructions, but (3) failure to instruct that jury could

recommend life sentence even if they found existence of a statutory aggravating circumstance and that they were authorized to consider mitigating circumstances was error requiring that death penalty be set aside and that there be a new sentencing trial.

Judgment affirmed as to the convictions; reversed as to the death sentence for murder.

Jordan, J., dissented to the reversal of death sentence for reasons set forth in another case.

1. Homicide ⇐250
Rape ⇐51(1)

Evidence, including defendant's statement to effect that he had killed victim and circumstantial evidence of carnal knowledge of victim, was sufficient to sustain defendant's conviction of rape and murder. Code, § 26-2001.

2. Criminal Law ⇐1169.5(4)

In proceeding in which defendant was convicted of rape and murder, GBI agent's voluntary testimony that defendant was known to have been drinking on night before offenses and that agent had learned that defendant "was the type [of] person * * * who got into fights. They had a bit of trouble with him periodically" was not so prejudicial that it could not be cured by instructions that jury was to disregard anything said about defendant in regard to drinking or trouble he might have had with police and that State had burden of proving that defendant committed crime for which he was charged. Code, § 38-202.

3. Homicide ⇐311, 341

In proceeding in which defendant was convicted of rape and murder and was sentenced to death, failure to instruct that jury could recommend life sentence even if they found existence of a statutory aggravating circumstance and that they were authorized to consider mitigating circumstances was error requiring that death penalty be set aside and that there be a new sentencing trial. Code, §§ 27-2503, 27-2534.1(b), (b)(2, 4, 7), (c), 27-2537(c)(1).

A. Vernon Belcher, Greenville, for appellant.

William F. Lee, Jr., Dist. Atty., Greenville, Arthur K. Bolton, Atty. Gen., John W. Dunsmore, Jr., Asst. Atty. Gen., Atlanta, for appellee.

HILL, Justice.

This is a death case. The defendant Eddie Spraggins, along with Freddie Davis,[1] was indicted in Meriwether County for the January 31, 1977, rape and murder of Miss Frances Coe. After a special jury found the defendant sane at time of trial, he was tried and found guilty on March 1 and 2, 1977, on both counts. Upon the jury's finding of a statutory aggravating circumstance to the murder charge, that the murder was committed while the offender was engaged in the rape, the defendant was sentenced to death for murder and life imprisonment for rape.

Evidence was presented from which the trial jury was authorized to find the following: On the afternoon of January 31, 1977, the semi-nude body of Frances Coe, age about 55, was found in her home in Manchester, Georgia. She had been repeatedly stabbed, slashed and cut, including having her throat cut. There were several wounds to the body which caused the victim to bleed heavily, with the most severe stab wounds being in the upper abdomen and lower chest, including two in the upper abdomen which penetrated the heart. She had been partially disembowelled. Death was attributed to a loss of blood.

The victim was found lying partially on her bed. Her sweater was open, her slip had been pulled up and her pantyhose and panties had been pulled down. There was testimony that there had been manipulation of the victim's sexual organs. There were bruises on her thigh and in the vicinity of the vaginal opening. There was hemorrhaging around the urethra and a small tear in the vaginal orifice. Doctor Byron

1. See *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978).

Dawson who performed the autopsy testified that although no sperm cells were found, in his opinion the injuries he described were consistent with those associated with sexual relations.

The defendant and the victim were neighbors. The night of the murder the defendant was seen burning something in his back yard. A zipper and cloth material and a flashlight of the type owned by the victim were recovered from the ashes.

When told that there was a warrant out for his arrest, the defendant stated that there was nothing to it, that he had hit somebody but that he did not get any money out of her.

In a pre-trial statement to a GBI agent (following appropriate advice concerning his rights) the 34-year-old defendant was quoted as follows: "On Sunday night, the 30th of January, 1977, Freddie Davis and I went to Frances Coe's house. We had been talking about robbing Frances Coe for a long time. We stopped at the back of the house, and I told Freddie to stay at the back and I went to the front, knocked on the door and Frances Coe let me in. I told her I wanted to use the telephone. I told her to open the back door and let Freddie in. I hit her and she started screaming. I got her around the neck and held her while I opened the back door. Freddie came in. I pulled her back into the bedroom. I had my hand over her mouth to keep her from hollering. Freddie said, 'Shut her up,' and handed me his knife, and I opened the knife and stabbed her and cut her throat. She just would not die and I just kept cutting. Freddie said, 'You got to finish her off.' I wiped the blood off my hands on a towel. I gave the knife back to Freddie. Freddie got her flashlight looking for money. After we left, he gave me the light. I burned it and a blue windbreaker behind my house."

The defendant presented two witnesses in addition to his own testimony. One witness testified that the defendant had worked for her husband but that he could only perform small uncomplicated menial tasks helping her husband do odd jobs around the house. She said that he could not count change for a dollar, and that she did not think he could read or write. The defendant's sister testified that he could never learn in school and always had mental problems and they sought help for him in a number of different places.

The defendant testified that he did not remember going to Frances Coe's house; that he drank heavily; that he did not rape her, nor had he ever raped anyone; that he could not read; and that he had never told law enforcement officers that he had participated in her killing.

On cross examination the defendant admitted he had burned several coats and "I might have did burn the flashlight too." He admitted that when he was arrested he was in the trunk of Buddy Mullis' automobile, and stated that he was not exactly hiding and that he found it comfortable in the trunk because it was a good place where he could lie down and rest when he wanted to be by himself.

On appeal the defendant enumerates two errors.

[1] 1. In the defendant's first enumeration he asserts that the trial court erred in denying his motion for new trial based on the general grounds. The evidence as to murder is more than adequate. In view of the death of the victim there is, however, no direct evidence as to the rape. Specifically, the evidence as to the second element of carnal knowledge, Code § 26–2001, is circumstantial at most. Considering all the facts and circumstances, however, we find that there was sufficient evidence regarding rape to support the jury's verdict. *Harris v. State*, 236 Ga. 242(1), 223 S.E.2d 643 (1976). It was not error to overrule the motion for new trial based on the general grounds.

[2] 2. In Enumeration 2 defendant asserts that the trial court erred in denying his motion for mistrial when a GBI agent voluntarily testified as to the defendant's character.

While the officer was testifying for the state the district attorney asked him: "Q.

Now, based on the evidence that you gathered in your investigation, you confronted the defendant Eddie Spraggins, is that correct?" The officer deviated, saying: "A. Not at this time. We continued to gather other things. Eddie Spraggins was known to have been drinking the night before and in this area. I did a little background work on Eddie Spraggins from the police department and learned that he was the type person, you know, who got into fights. They had a bit of trouble with him periodically. In addition to this, just prior to—" The district attorney interrupted asking: "Q. But, you did eventually go to him, is that correct?" The officer answered: "A. Oh, yes sir. I did eventually go to him. I was just telling you the background, what led me to him." The district attorney next asked the officer if he had had a conversation with the defendant.

Thereafter the jury was excused and a *Jackson-Denno* hearing was held. At its conclusion, defendant's counsel moved for a mistrial because the officer had injected the defendant's bad character into evidence. The court overruled the motion for mistrial but on return of the jury the trial court instructed the jury as follows: "The court instructs you to disregard anything that might have been said pertaining to this defendant in regard to any drinking or any fighting or any conflicts, any trouble he might have been in with the Manchester Police Department, because that has no bearing on this case whatsoever. The purpose of this case is to determine whether or not this defendant did commit the crime for which he is charged. The state has the burden of proving that and not anything other than that shall be considered in the trial of this case."

We do not find that the officer's improper comments in the presence of the jury were so prejudicial that the curative instructions by the court were ineffective. The trial court did not abuse its discretion in refusing to grant the motion for mistrial. *Googe v. State*, 237 Ga. 175(1), 227 S.E.2d 51 (1976); *Lynch v. State*, 234 Ga. 446, 448, 216 S.E.2d 307 (1975); *Woods v. State*, 233 Ga. 495, 497–498, 212 S.E.2d 322 (1975); *Wingfield v. State*, 231 Ga. 92(8), 200 S.E.2d 708 (1973); Code Ann. § 38–202.

3. *Sentence review.*

[3] After finding the defendant guilty of murder and rape at the guilt-innocence phase of the trial, at the sentencing phase the jury found that the offense of murder was committed while the offender was engaged in the commission of another capital felony, the rape, and imposed the death penalty. This was the only aggravating circumstance as to which the defendant had been put on notice. Code Ann. § 27–2503. Cf. Code Ann. § 27–2534.1(b)(2), (4) and (7).

We first consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. Code Ann. § 27–2537(c)(1).

The court's sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (*Fleming v. State*, 240 Ga. 142(7), 240 S.E.2d 37 (1977), and failed to inform the jury that they were authorized to consider mitigating circumstances in contravention of requirements laid down in Code Ann. §§ 27–2534.1(b) and 27–2534.1(c), *Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977)). The jury instructions in the case before us failed to comply with the requirements of *Fleming* and *Hawes* and thus the death penalty must be set aside and a new sentencing trial allowed.

Judgment affirmed as to the convictions; reversed as to the death sentence for murder.

All the Justices concur, except JORDAN, J., who dissents from the reversal of the death sentence.

JORDAN, Justice, dissenting.

I dissent to the reversal of the death penalty for the reasons set forth in my dissent in *Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978).

Now, His Honor will charge you that the defendant comes into this court with the presumption of innocence in his favor and the burden rests upon the State to satisfy your minds to the reasonable doubt that this defendant is guilty and that he should be executed.

Now, with these brief remarks I am going to leave it with you and ask you to bring back a verdict here recommending mercy. Then the Judge will sentence him to life in prison and he will never get out. He is not even eligible until he has been in there for 25 years. And with these remarks, I thank you.

THE COURT: Ladies and gentlemen of the jury, this defendant has been found guilty of the offense of murder. It is now your duty to determine within the limits prescribed by law the penalty that shall be imposed for that offense.

Under the laws of this state, every person guilty of the offense of murder shall be punished by life imprisonment or death by electrocution. In all cases for which the death penalty may be authorized, the law provides that the judge

shall instruct the jury concerning any evidence in extenuation, mitigation and aggravation, which the jury may consider in making their decision as to what punishment is to be imposed upon the defendant.

In reaching your determination, you are authorized to consider all of the evidence received by you in open court.

You are authorized to consider all of the facts and circumstances of the case.

Ladies and gentlemen of the jury, in reaching your verdict you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether mitigating circumstances exist, you are authorized to consider all of the evidence produced by the State and the defendant throughout this trial.

Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the moral culpability or blame.

In reaching this verdict, you are not required to find mitigating circumstances

in order to recommend the sentence of life in prison. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case.

Ladies and gentlemen of the jury, I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances as I will define to you later in this charge, sufficient to authorize the supreme penalty of the law.

Aggravating circumstances are those which increase the guilt or enormity of the offense or as to its injurious consequences.

The law provides that when a party is tried by a jury, and is convicted of an offense that may be punished by death, the sentence of death shall not be imposed, unless the jury's verdict includes a finding of at least one aggravating statutory circumstance and a recommendation that the death sentence be imposed. When a statutory aggravating circumstance is found, and a recommendation of death is made, the Court shall sentence the defendant

to death.

When a sentence of death is not recommended by the jury, the Court shall sentence the defendant to prison for and during his natural life.

Therefore, before you would be authorized to recommend a sentence of death, in this case, you must find that the State has proved at least one of the following statutory aggravating circumstances to exist beyond a reasonable doubt:

One, the offense of murder was committed while the offendor was engaged in the commission of additional capital felonies, to wit, the rape of Frances Coe.

Two, the offense of murder was outrageously and wantonly vile, horrible and inhuman and in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

Now, ladies and gentlemen of the jury, a list of these aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you in the jury room during your deliberations.

Ladies and gentlemen of the jury, if you do not find that the State has proved at least one of these statutory aggravating circumstances beyond a reasonable doubt, then you must recommend a sentence of life imprisonment.

If you should find that the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you still may, if you so choose, recommend a sentence of life imprisonment.

If you find the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you may recommend that the death penalty be imposed, but you are not required to do so.

Now, ladies and gentlemen of the jury, a reasonable doubt is a doubt for which you can give a reason, and means just what it says. It is the doubt of a fair-minded impartial juror honestly seeking the truth -- not an arbitrary or capricious doubt, but a doubt arising from a consideration of the evidence, or from a lack of evidence, or from a conflict of evidence.

Ladies and gentlemen of the jury, upon

retiring to the jury room, you will select one of you to act as foreman or forelady, who will preside over your deliberations, and who will sign the verdict to which all 12 of you freely and voluntarily agree. Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately express a determination or insist upon a certain verdict. If your sense of pride is aroused, you may hesitate to change your position if you decide if you are wrong. Consult with one another and consider each other's views. Each of you must decide this case for yourselves, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced that it is wrong. However, you should never surrender honest convictions or opinions in order to be congenial, or to reach a verdict solely because of the opinions of other jurors.

Now, I charge you that the verdict you return in this case must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree

thereto. The verdict must be unanimous.

Now, ladies and gentlemen of the jury, after a careful consideration of all of the evidence, facts and circumstances of this case, under the rules of law that I have given you in charge, if your verdict should be death, then the form of your verdict would be:

"We, the jury, recommend death. We find the following aggravating circumstances:"

Listing the circumstances that you find.

On the otherhand, if you do not find that there was one or more aggravating circumstances, or it is your verdict that you do not recommend death in this case, then the form of your verdict would be:

"We, the jury, affix punishment at life."

Whatever your verdict may be, it can be written by filling in the blanks and marking out that which does not apply so as to make this form, which I have prepared for you, speak the true verdict of the jury. Please remember to mark out the part of the form that does not apply and fill in the blanks that do apply. Your verdict should be dated, and should be signed by your foreman.

Ladies and gentlemen of the jury, you may retire to fix the punishment in this case. You may begin deliberating as soon as you receive the indictment and all the evidence that was introduced in this case. However, ladies and gentlemen of the jury, before you retire, I hereby instruct the two alternate jurors to keep their seats until the other 12 jurors have gone to the jury room. Let this jury go to the jury room.

(Thereupon, the jury exited the hearing room.)

THE COURT: You all gather up the evidence.

Now, in regard to you two alternate jurors, you will not sit in on the deliberations of the jury in this matter unless you are needed later on. Another room has been made available to you where you will remain under guard by a court bailiff so you will be available if you are needed.

Let these two alternate jurors go to one of the witness rooms with a bailiff on guard.

(Thereupon, the two alternate jurors exited the hearing room.)

THE COURT: All right, you other bailiffs

gather up all this evidence including the indictment, the form of the verdict, and take it into the jury room for their consideration.

(Thereupon, a recess was taken while the jury deliberated the case.)

THE COURT: Let the record reflect that the jury has announced it has reached a verdict. The defendant is in the courtroom. The defendant's lawyer is in the courtroom.

Let the jury come in.

(Thereupon, the jury entered the hearing room.)

THE COURT: Let's everybody be seated and quiet.

Ladies and gentlemen of the jury, have you reached a verdict?

THE FOREMAN: Yes, we have.

THE COURT: The Court would like to announce that regardless of what the verdict is, there will be no outbursts. Everybody will remain seated until we have recessed court and the jury is escorted from the courtroom.

All right, receive the verdict, Mr. Lee.

MR. LEE: Madame Foreman, you must strike out one of the two verdicts. Don't strike out what does not apply. If you recommend life,

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THE STATE. : CASE NO. 1188

VS : MERIWETHER COUNTY

EDDIE SPRAGGINS : SUPERIOR COURT

CRIM. MIN. BOOK 10 PAGE 526

PUNISHMENT CHARGE

LADIES AND GENTLEMEN OF THE JURY, THE DEFENDANT IN THIS CASE HAS BEEN FOUND GUILTY OF THE OFFENSE OF MURDER, AND IT IS YOUR DUTY TO DETERMINE, WITHIN THE LIMITS PRESCRIBED BY LAW, THE PENALTY WHICH SHALL BE IMPOSED AS PUNISHMENT FOR THAT OFFENSE.

UNDER THE LAWS OF THIS STATE, PUNISHMENT FOR THIS OFFENSE IS DEATH BY ELECTROCUTION, OR BY LIFE IN PRISON. I CHARGE YOU THA TO RETURN A VERDICT RECOMMENDING DEATH, THERE MUST BE SOME AGGRAVA CIRCUMSTANCE, OR CIRCUMSTANCES FOUND BEYOND A REASONABLE DOUBT.

I CHARGE YOU THAT YOU MAY LOOK TO SEE IF THERE WAS ANY ONE OR MORE OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES:

(1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the Rape of Frances Coe.

CRIM. MIN. BOOK 10 PAGE 527

(2) The offense of Murder was outrageously and wantonly vile, horricle and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

IF YOU FIND THERE WAS ONE OR MORE OF THESE AGGRAVATING CIRCUMSTANCES, ESTABLISHED BEYOND A REASONABLE DOUBT, YOU MAY FIX PUNISHMENT AT DEATH.

IN THIS EVENT, THE FORM OF YOUR VERDICT WOULD BE:

"WE, THE JURY, RECOMMEND DEATH". "WE FIND THE FOLLOWING AGGRAVATING CIRCUMSTANCES; (1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: -the Rape of Frances Coe.

CRIM. MIN. BOOK 10 PAGE 528

(2) The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

IF YOU DO NOT FIND THAT THERE WAS ONE OR MORE AGGRAVATING CIRCUMSTANCES, THEN THE FORM OF YOUR VERDICT WOULD BE, "WE, THE JURY, FIX PUNISHMENT AT LIFE".

WHATEVER YOUR VERDICT MAY BE, IT CAN BE WRITTEN BY FILLING IN THE BLANKS, AND MARKING OUT THAT WHICH DOES NOT APPLY SO AS TO MAKE THIS FORM WHICH I HAVE PREPARED FOR YOU SPEAK THE TRUE VERDICT OF THE JURY.

THE VERDICT SHOULD BE DATED AND SIGNED BY ONE OF YOUR MEMBERS AS FOREMAN.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EDDIE SPRAGGINS,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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40

QUESTIONS PRESENTED

I.

Whether or not the submission of an additional statutory aggravating circumstance to the jury upon Petitioner's resentencing trial, constituted a violation of the Fifth Amendment ban against double jeopardy or of Petitioner's right to due process.

II.

Whether the implementation of the death sentence in this case and the affirmance of same by the Georgia Supreme Court had been accomplished in such a manner so as to insure said sentence was free from arbitrariness and capriciousness and was not disproportionate.

III.

Whether it was necessary for the trial court to give limiting and explanatory instructions relating to the punishment phase of Petitioner's trial in regard to Ga. Code Ann. § 27-2534.1(b)(7), and in the absence of said instructions, whether the Supreme Court of Georgia properly reaffirmed Petitioner's death sentence.

IV.

Whether the trial court's instructions to the jury during the sentencing phase of Petitioner's trial, when considered as a whole, sufficiently informed said jury that they could consider all of the circumstances of the case, including mitigating circumstances, and that they could impose a life sentence even though they found the existence of statutory aggravating circumstances.

V.

Whether or not Peititioner received effective assistance of counsel.

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PART ONE

STATEMENT OF THE CASE

This is the third time this case has come before this Court on a petition for writ of certiorari. Petitioner, Eddie Spraggins, was indicted along with co-defendant Freddie Davis, by the February Term, 1977, Meriwether County, Grand Jury for the murder and rape of Frances Coe. Following a jury trial on March 1-2, 1977, in which Petitioner was separately tried from his co-defendant, Petitioner was found guilty on both counts, and was sentenced to death for the murder conviction and to life for the rape.

As a result of Petitioner's conviction in 1977, an appeal was taken to the Supreme Court of Georgia. Said Court upheld Petitioner's conviction, but granted him a new trial as to sentencing. The Court found that the jurors had not been adequately instructed during the sentencing phase of Petitioner's trial, because the trial court's sentencing instructions failed to make it clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance, and also failed to adequately inform the jury that they were authorized to consider mitigating circumstances. Spraggins v. State, 240 Ga. 759, 763, 243 S.E.2d 10 (1978). [Hereinafter referred to as Spraggins I].

On May 22, 1978, a new jury for resentencing was selected, and after being presented with substantially the same evidence which the State had presented in Spraggins I, that jury again sentenced Petitioner to death for the murder of Ms. Coe. The Supreme Court of Georgia on appeal from the resentencing trial affirmed Petitioner's death penalty. Spraggins v. State, 243 Ga. 72, 252 S.E.2d 620 (1979). [Hereinafter referred to as Spraggins II]. On May 27, 1980, certiorari was granted by

this Court, the Georgia Supreme Court's affirmance of Petitioner's death penalty was vacated, and the case was remanded for further review by the Georgia Supreme Court in light of this Court's recent decision in Godfrey v. Georgia, 446 U.S. 420 (1980). Spraggins v. Georgia, 446 U.S. 961 (1980).

Upon remand, the Georgia Supreme Court again reaffirmed Petitioner's death sentence. Spraggins v. State, 246 Ga. 432, 281 S.E. 828 (1980). Thereafter, Petitioner filed a second petition for a writ of certiorari in this Court. This second petition was denied, Spraggins v. Georgia, 451 U.S. 910 (1981), as was a motion for rehearing. Spraggins v. Georgia, 452 U.S. 932 (1981).

Thereafter on July 22, 1981, a new execution date was set for August 3, 1981. A stay of execution was granted when Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia. Following an evidentiary hearing, the Butts County Superior Court, in an order dated January 4, 1982, denied habeas relief. Petitioner's application for a certificate of probable cause to appeal was denied by the Georgia Supreme Court on February 17, 1982, and he then filed this third petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

On January 31, 1922, the body of the victim, Ms. Frances Coe, was discovered in her home in Meriwether County, Georgia. During the trial, Georgia Bureau of Investigation Officer Bert Davis described the condition of the murder victim as follows: "On the bed on the right, Ms. Coe was lying with her head in the direction of the wall, and her feet down onto the floor. She was in a semi-nude condition, panties and panty hose had been pulled down and were still attached to the left foot. She wore a slip which was pulled up here in the area of the breast and had on a green sweater which was open. There were numerous lacerations to the throat. It was cut just practically out. Further examination revealed a deep cut here in her eye which appeared to be a bruise type cut and not a slash. Numerous stab marks and slashes in the chest area and a slash mark on her breast, slash marks in the abdomen area on the left side, one approximately 5 inches. From the top of the vagina up through the navel, Ms. Coe was split open. The intestines were pulled from the stomach and lying on top of her stomach." (T. 40, Spraggins I).

The autopsy which was later performed revealed that the cause of death was due to a loss of blood. There were several wounds to the body which caused the victim to bleed heavily, with the most severe stab wounds being in the upper abdomen and lower chest, including two in the upper abdomen which penetrated the heart. There was also evidence that there had been some manipulation to the victim's sexual organs.

Particularly, there were two areas of injury in the vicinity of the vaginal opening. The second injury consisted of bruising around the vaginal orifice. The autopsy further indicated that there was a considerable amount of hemorrhaging around the urethra, as well as there being a small tear in the vaginal orifice.

During the course of the investigation the law enforcement officers were led to the yard of the Petitioner's residence. With the consent of the Petitioner's mother the law enforcement officers uncovered from a pile of ashes, a zipper and cloth material which appeared to come from a jacket, as well as a flashlight which had recently been borrowed from the victim. The search of Petitioner's yard was occasioned by virtue of the fact that a neighbor, on the night of the murder, had seen something burning there.

A Georgia Bureau of Investigation agent later confronted Petitioner with the evidence which he had gathered on Ms. Coe's murder. After being advised of his rights, Petitioner voluntarily chose to give a statement. In that statement he implicated Freddie Davis by stating that Davis went to Frances Coe's house on Sunday, January 30, 1977. Petitioner stated that he had been talking about robbing Ms. Coe for quite some time. Petitioner went to the front door of the Coe residence while Davis remained at the back door. In order to gain entrance into Ms. Coe's house he fabricated the excuse that he wanted to use her telephone. Upon gaining entrance, Petitioner attempted to force Ms. Coe to open the back door, but she refused and began to scream. Petitioner proceeded to grab Ms. Coe around the neck and opened the door in order to permit Davis to gain entrance.

Petitioner then dragged Ms. Coe to the bedroom while at the same time keeping his hand over her mouth to prevent her from screaming. Davis told Petitioner to "shut her up." While making this remark Davis handed Petitioner a knife, following which Petitioner proceeded to stab Ms. Coe as well as to cut her throat. Petitioner told the officers that Ms. Coe would not die, and that he kept cutting her. Davis egged him on stating, "You got to finish her off." After eventually subduing Ms. Coe, Petitioner stated that he wiped the blood from his hands, and gave the knife back to Davis. Davis then used the victim's flashlight in order to search for money. Later, behind his house, Petitioner burned the windbreaker that he was wearing. Davis returned the flashlight to the Petitioner after they left Ms. Coe's house.

Additional facts will be recited in the following portion of this brief when necessary to more fully explain Respondent's arguments.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE SUBMISSION TO THE JURY OF AN ADDITIONAL STATUTORY AGGRAVATING CIRCUMSTANCE AT PETITIONER'S RETRIAL ON SENTENCING, AND THE JURY'S FINDING OF SAME, NEITHER SUBJECTED PETITIONER TO DOUBLE JEOPARDY NOR VIOLATED HIS RIGHTS TO DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL.

Under Petitioner's first and second reasons for granting the writ, and under his first argument in support thereof, he raises an issue pertaining to the trial court's permitting the district attorney to present evidence on an additional statutory aggravating circumstance which was not specifically submitted to the jury nor found at Petitioner's initial trial. After Petitioner's death sentence was reversed by the Supreme Court of Georgia on his first direct appeal (Spraggins I), Petitioner was returned to the Superior Court of Meriwether County for a new trial on sentencing. In the first trial, the district attorney submitted for the jury's consideration, the statutory aggravating circumstance that the murder was committed while the Petitioner had been engaged in the commission of another capital felony, that being the rape of Ms. Coe. See Ga. Code Ann. § 27-2534.1(b)(2). Prior to resentencing the district attorney gave notice to the Petitioner orally and in writing that the State would be seeking the death penalty under Georgia's seventh aggravating circumstance [Ga. Code Ann. § 27-2534.1(b)(7)], as well as under the (b)(2) aggravating circumstance.[1/]

1/ Of course, as this Court is well aware Georgia's (b)(7) aggravating circumstance permits a jury to impose the death penalty upon a finding that a murder is outrageously or wantonly vile, horrible and inhuman in that it involved torture, aggravated battery or depravity of mind. Georgia's (b)(2) aggravating
(FOOTNOTE CONTINUED ON NEXT PAGE)

Following the resentencing trial, the jury returned its verdict finding that the state had proven beyond a reasonable doubt the existence of the (b)(7) aggravating circumstance. Petitioner argues that this constituted double jeopardy, and that the state should have been prohibited from adding an additional aggravating circumstance at the subsequent resentencing trial. Petitioner also asserts that the addition of the (b)(7) aggravating circumstance upon Petitioner's retrial, was a violation of Ga. Code Ann. § 27-2503 and resulted in a fundamentally unfair proceeding.

This Court may initially note that these exact same issues were raised on Petitioner's direct appeal following resentencing (Spraggins II), and upon Petitioner's first and second petitions for writ of certiorari in this Court. Petitioner makes the same arguments that he made in his first and second petitions, and cites no new reasons why certiorari should be granted now after it had previously been rejected on these same issues twice before.

As has been previously noted, in reviewing Petitioner's case on direct appeal following resentencing, the Georgia Supreme Court found there was no double jeopardy violation as a result of the trial court's submission of an additional aggravating circumstance for the jury's consideration at resentencing. (Spraggins II, supra at p. 75-76). The ruling

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(FOOTNOTE 1 CONTINUED FROM PREVIOUS PAGE)

circumstance requires a finding that the murder was committed while the offender was engaged in the commission of another capital felony or while the offender was engaged in the commission of burglary or arson in the first degree. Rape is considered a capital felony for the purposes of Ga. Code Ann. § 27-2534.1(b)(2). See Peek v. State, 239 Ga. 422, 432, 238 S.E.2d 12 (1977).

in Spraggins has more recently been upheld by the Georgia Supreme Court in the recent cases of Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981); and Zant v. Redd, 249 Ga. 211, ___ S.E.2d ___ (1982). In Godfrey, the defendant had initially been convicted of murder and received a death penalty based upon the jury's finding of the existence of the (b)(7) aggravating circumstance. Upon review by this Court, Godfrey's death sentence was vacated and remanded for further proceedings. Godfrey v. Georgia, 446 U.S. 420 (1980). Upon remand to the Superior Court for resentencing, the jury returned another verdict in favor of the death penalty, finding the existence of the (b)(2) aggravating circumstance.

Citing Burks v. United States, 437 U.S. 1 (1978); Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852 (1981); Price v. Georgia, 398 U.S. 323 (1970); United States v. Ball, 163 U.S. 662 (1896); Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979) and Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980), the Georgia Supreme Court found that the retrial and subsequent imposition of Godfrey's second death sentence did not violate his constitutional rights. The court specifically found that since the reversal in Godfrey was solely upon legal grounds, the retrial on sentencing was not for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster at the first proceeding. As in the instant case, in Godfrey the court recognized that at the initial sentencing proceeding, there was sufficient evidence which would have supported the jury's finding of an additional aggravating circumstance. Additionally, the court placed emphasis upon the jury's initial recommendation of the death penalty which it noted as a distinguishing feature

from Bullington, supra. The Georgia court went on to state:

> "Appellant further argues that since the state limited its case to the single aggravating circumstance [(Code Ann. § 27-2534.1 (b)(7)] at the initial trial, it is barred from seeking a death penalty on any other aggravating circumstance. We do not agree. Double jeopardy not attaching under the circumstance, the original sentence, at the appellant's behest, has been nullified. The state and defense start anew. See North Carolina v. Pearce, 395 U.S. 711 (89 S.C. 2072, 23 L.Ed.2d 656) (1969); Bullington v. Missouri, supra; Redd v. State, supra. Therefore, the state is not limited to the aggravating circumstances relied upon at the first hearing. Spraggins v. State, supra; Davis v. State, supra; Green v. State, supra." Godfrey v. State, supra at p. 619.

Following the affirmance of Petitioner's new death penalty, Godfrey filed a petition for writ of certiorari in this Court, raising the same issues as Petitioner Spraggins has raised under his first argument relating to the addition of a new statutory aggravating circumstance not relied upon at the first trial. Certiorari was denied on April 5, 1982, and rehearing was denied on May 24, 1982. Godfrey v. Georgia, ___U.S.___, 102 S.Ct. 1778 (1982), rehng. denied, ___U.S.___, 102 S.Ct. 2286 (1982).

In Zant v. Redd, 249 Ga. 211, ___ S.E.2d___ (1982) only three aggravating circumstance were initially submitted to the jury at Redd's first sentencing trial. The jury imposed the death sentence,but listed only one aggravating circumstance in support thereof. Following a reversal of Redd's death penalty, he was retried on sentencing, and at this second sentencing trial the jury was instructed that it was authorized to consider four aggravating circumstances - the three submitted to the first jury plus an additional one. Id. at p. 211-212.

In considering the factual situation in Redd in light of Bullington v. Missouri, supra, the Georgia Supreme Court found that the basis of the Bullington decision was that the procedure involved in sentencing under Missouri's death penalty statute closely resembled that of a trial on guilt or innocence. In Bullington this court indicated that the Missouri sentencing procedure required the jury to determine that the state had actually proved its case when seeking to impose the death penalty. Consequently, the sentence of life amounted to an acquittal of the death penalty. Thus, when the defendant in Bullington initially received a life sentence, he could not again be retried on sentencing and receive the death penalty.

However, the rationale of Bullington does not apply to a simple finding of statutory aggravating circumstances. Under the statute in Georgia, there is only a requirement that the jury find at least one aggravating circumstance in order to impose the death penalty. Zant v. Redd, supra at p. 213. In the instant case, the jury was so instructed.

Thus, the decision by the jury was not a mutually exclusive one in regards to the choice of life or death. Under Georgia law the state and the defense start anew at a resentencing hearing. Aggravating circumstances are simply procedural standards designed to control a jury's discretion in capital cases in order to insure against a capricious and arbitrary enforcement of the death penalty. They are not substantive "penalties" or "offenses", they do not place the defendant's life in peril or subject him to a possible "conviction" but are simply standards which guide the jury's decision on which sentence to impose. Zant v. Redd, supra at p. 213-214. Therefore, the state is not limited to the aggravating circumstances relied upon at the first hearing. Godfrey v. State, supra at p. 619; Zant v. Redd, supra at p. 214.

It is important to note here that the jury was simply considering circumstances which authorized and justified imposition of the death penalty. As was held in North Carolina v. Pearce, 395 U.S. 711 (1969), a defendant may be retried when his conviction has been set aside because of any error which led to his conviction, and absent a vindictive motive by the trial court, a greater sentence may be imposed if justified. Id., at p. 720, 723, cf. Stroud v. United States, 215 U.S. 15 (1919). In deciding on the imposition of the second sentence, the double jeopardy clause does not preclude the sentencing judge from considering new evidence and information that was not considered in the first trial. North Carolina v. Pearce, supra at p. 723.

The jurors in Petitioner's first trial were neither asked to consider nor instructed on Georgia's seventh statutory aggravating circumstance. Petitioner appears to argue that the failure of the trial court to submit or the jury's failure to find same constituted an implied acquittal under that aggravating circumstance. However, since the (b)(7) circumstance was not submitted to the jury, the jury obviously could not have acquitted the Petitioner thereof. See generally, Hardwick v. Doolittle, 558 F.2d 292, 297-298 (5th Cir. 1977), cert. den., 434 U.S. 1049 (1977). There is also no evidence to indicate that the district attorney's action in submitting an additional statutory aggravating circumstance in this case resulted from any vindictiveness. The Petitioner was not subjected to the potential for a greater conviction, and his retrial did not subject him to a greater punishment than that imposed at his first trial.

Petitioner's argument that the submission of Georgia's seventh aggravating circumstance to the jury violated Georgia's statutory law (Ga. Code Ann. § 27-2503)[2/] also does not require review on certiorari by this Court. The argument that Ga. Code Ann. § 27-2503 had been violated by the submission of the (b)(7) aggravating circumstance to the jury, was not considered nor ruled upon by the Georgia Supreme Court and was not argued or considered by the state habeas court, and should not be considered now for the first time. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 411 U.S. 531 (1973).

2/ The pertinent portion of Ga. Code Ann. § 27-2503 relating to presentence hearings in felony cases, states that: "In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior coviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

Additionally, it must be noted that there was no objection filed prior to trial relating to the addition of the (b)(7) aggravating circumstance, nor was there an objection when the court submitted the same during its charge to the jury. The question of whether Code Section 27-2503 had been violated, is really a question of state statutory interpretation on an evidentiary question, and does not rise to constitutional magnitude.

Here, the (b)(7) aggravating circumstance naturally turned upon the facts which were proven during the retrial. Approximately one month prior to the resentencing trial, the prosecution informed the defense orally and in writing, at a formal hearing, that the death penalty would be sought under the (b)(7) and (b)(2) aggravating circumstances, and that the evidence relating to the Petitioner's participation in the crime would be the same as was produced in the first trial. The defendant was represented by the same attorney at both his original trial and resentencing.

Under these facts Petitioner had more than ample notice of the aggravating circumstances which the state intended to prove.

For all of the aforesaid reasons, Respondent urges this Court to reject Petitioner's first argument.

II. THE GEORGIA STATUTORY PROCEDURES FOR THE IMPLEMENTATION OF THE DEATH PENALTY, AND THE GEORGIA SUPREME COURT'S REVIEW OF PETITIONER'S CASE THEREUNDER, SUFFICIENTLY PROTECTED PETITIONER'S RIGHT TO BE FREE FROM AN ARBITRARY, CAPRICIOUS OR A DISPROPORTIONATE SENTENCE.

Petitioner's second argument in support of the issuance of the writ of certiorari in this case, asserts that this Court's mandates as set out in Furman v. Georgia, 404 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976) were violated and circumvented by the alleged introduction of prejudicial, improper evidence, prosecutorial comment before the jury and by the lack of an adequate review by the Georgia Supreme Court under its mandatory appellate process in death penalty cases.[3/] These exact same arguments were also previously made in the first and second petitions which were filed in this Court on behalf of Petitioner. As with his first argument, Petitioner makes no new arguments and cites no new authority which would now make the granting of certiorari appropriate.

Since a review of the record amply demonstrates that the objected to evidentiary items were properly admitted, that the prosecutor's arguments violated neither Georgia law nor were they so grievous as to violate Petitioner's fundamental due process rights to a fair trial, and since it is evident the

3/ Ga. Code Ann. § 27-2537(c) directs that the Georgia Supreme Court, on the appeal of a death penalty case, must determine: "(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) Whether, in cases other than treason or aircraft highjacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 27-2534.1(b), and (3) Whether the sentence of death is successive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Georgia Supreme Court's review complied with the requirements of the aforesaid Georgia statute, this Court should decline to grant the writ based upon Petitioner's arguments contained under his second heading.

Under subsection A of Petitioner's second argument he focuses upon the introduction into evidence of alleged inflammatory or improper photographs of the victim, and contends that the introduction of said photos, when combined with the statements made by the prosecutor, operated to "arouse the jury's fear and prejudice and . . . appeal to the jurors' sense of terror and outrage." (Petitioner's Brief, p. 14).

First, relating to the photographs of the victim; it is clear that under Georgia law that photographs which are material to issues at trial, and which depict the nature and extent of the victim's wounds and injuries are admissible for the jury's consideration. See, Bowden v. Zant, 239 Ga. 821, 825, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978); Franklin v. State, 245 Ga. 141, 148, 263 S.E.2d 666 (1980), cert. den., ___U.S.___, 100 S.Ct. 3029 (1980).

On Petitioner's retrial the sole question before the jury related to the issue of sentencing, and whether the state had proven the existence of any of the statutory aggravating circumstances beyond a reasonable doubt so as to potentially justify a death penalty. One of the aggravating circumstances submitted to the jury on this retrial, for their consideration related to Ga. Code Ann. § 27-2534.1(b)(7), which authorizes the death penalty when the jury finds beyond a reasonable doubt that the murder ". . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." In determining this issue and generally, in weighing the heavy responsibility relating

to the imposition of the death penalty, most certainly the jury is authorized to view the extent and the nature of the victim's wounds or injuries. Quite often words and oral descriptions are simply inadequate to accurately convey the nature of the crime. As is often said, a picture is worth a thousand words.

Normally, the admission of photographs does not rise to constitutional dimension. Talbot v. Nelson, 390 F.2d 801 (9th Cir. 1968), cert. den., 393 U.S. 868 (1968). Their admission rests within the sound discretion of the trial judge, notwithstanding the fact that they may be gruesome or shocking. United States v. Hoog, 504 F.2d 45 (8th Cir. 1972), cert. den., 420 U.S. 961 (1975); United States v. Shoemaker, 542 F.2d 561 (10th Cir. 1976), cert. den., 429 U.S. 1004 (1976). Here, the probative value of the photos used in the jury's individualized sentencing procedure, outweighed any prejudicial effect to the Petitioner, and thus they were properly admitted. United States v. Kaiser, 545 F.2d 464, 476 (5th Cir. 1977).

Petitioner also argues that the prosecutor's cross-examination of the Petitioner and his closing argument were improper under Ga. Code Ann. § 27-2206,[4/] and worked in conjunction with the aforesaid admission of photographs to unconstitutionally prejudice

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4/ Ga. Code Ann. § 27-2206 reads as follows: "No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole, or clemency of any nature may be granted by the Governor, State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency. If counsel for either side in a criminal case should so argue to the jury, opposing counsel shall have the right to immediately request the court to declare a mistrial; and in which case, it shall be mandatory upon the court to declare a mistrial; and upon failure to do so, same shall constitute reversible error.

This section shall be construed as setting forth regulations in addition to those provided for in Section 24-3319 and Section 81-1009."

the Petitioner by allegedly influencing the jury to render an arbitrary or capricious verdict.

Regarding the cross-examination questions put to the Petitioner, as evidenced on page 13 of Petitioner's brief, it is first important to note that the defense offered no objections during the trial relating to said questions. Also the question of improper cross-examination was not raised on direct appeal, and was not considered by the Georgia Supreme Court. This Court has ruled that federal constitutional issues raised for the first time on appeal from a state court decision will normally not be heard. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 410 U.S. 531 (1973); also see, 28 U.S.C. 1257.

The Georgia Supreme Court, however, did review the question of whether the prosecutor's closing arugments to the jury violated the aforesaid Code Section 27-2206, and concluded that there was no such violation. Spraggins v. State, 243 Ga. at p. 74. As noted in the previous section of this brief, normally the decision of the highest state court on questions of state law are dispositive, absent an obvious intent to evade the consideration of a federal issue or to frustrate due process. Mullaney v. Wilbur, 421 U.S. 684 (1975). Here the prosecutor's argument, as cited on page 14 of Petitioner's brief fell within the permissible limits of Code Section 27-2206. Under established Georgia law the argument of counsel, and particularly the latitude which will be afforded to counsel during closing argument, rests within the broad discretion of the trial judge. See, Hart v. State, 227 Ga. 171, 173, 179 S.E.2d 346 (1971); Hinton v. State, 138 Ga. App. 702, 227 S.E.2d 474 (1976).

When the state is seeking the death penalty, it is not improper for the prosecutor to argue for the imposition of same or to give plausible reasons for his position. Chenault v. State, 234 Ga. 217(7), 215 S.E.2d 223 (1975); Strickland v. State, 209 Ga. 675(2), 75 S.E.2d 6 (1953); Allen v. State, 187 Ga. 178, 182, 200 S.E. 709 (1938).

In the instant case it appears the district attorney was simply arguing that the protection and safety of the community justified the need for the death penalty in this case. The district attorney did not mention the term pardon, parole, executive clemency or the potential for Petitioner's release in any other manner. Comments similar to those utilized in this case have consistently been held not to violate the statute. See, Redd v. State, 242 Ga. 876, 880, 252 S.E.2d 383 (1979), cert. den., 222 U.S. 934 (1979); Mason v. State, 236 Ga. 46, 49, 222 S.E.2d 339 (1976), cert. den., 428 U.S. 910 (1976). Furthermore, the trial court insured that there was no potential or prejudice by adequately instructing the jury. (T. 282).

Petitioner also argues that the combination of the above, plus the alleged inadequate instructions by the trial court prior to the jury's deliberations, operated to permit the jury to exercise unbridled discretion in the Petitioner's sentencing. This argument is also unmeritorious. Contrary to Petitioner's assertions, the jury was instructed adequately, and in accordance with the requirements of the Georgia statutory scheme as approved by this Court in Gregg v. Georgia, supra.

Of course, the jury is entitled to consider all of the evidence and the facts and circumstances of the case and the background of the petitioner in making its decision. This is the basis for the individualized sentencing as required by Gregg and the recent case of Lockett v. Ohio, 98 S.Ct. 2954 (1978). Here, the Petitioner was found guilty of brutally murdering the victim in this case, and the evidence amply showed that while in the process he horribly mutilated her body. It was perfectly permissible for the jury to actually see the consequences of the Petitioner's actions, and to consider his past record and the potential for a repeat performance.

An examination of the trial court's sentencing instructions (Petitioner's Appendices) demonstrates that Petitioner's rights were amply protected, and this Court should find no merit to his arguments that the trial court's evidentiary rulings and instructions contributed to an arbitrary decision.

Finally, Petitioner's arguments that the Georgia Supreme Court's review on appeal has been inadequate is without evidence in the record to support it, is conclusory, and is simply speculative. The Georgia court indicated that it considered the aggravating circumstances found by the jury, the evidence which was introduced in court concerning the crime and the defendant, and thoroughly reviewed the record and the transcript. Likewise, the Georgia Supreme Court compared the instant case with other death penalty cases, and concluded that the sentence was not excessive or disproportionate in considering both the crime and the defendant. Spraggins v. State, 243 Ga. at pp. 75-76. Thus, the Georgia Supreme Court's review was sufficient. Also see, Spraggins v. State, 246 Ga. 432, 281 S.E.2d 828 (1980).

III. THE SUPREME COURT OF GEORGIA PROPERLY REAFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7) IN LIGHT OF GODFREY V. GEORGIA, 446 U.S. 420, 100 S.CT. 1759 (1980).

Following Petitioner's retrial on sentencing the jury returned a death penalty verdict based upon its finding that the murder in this case was outrageously and wantonly vile, horrible and inhuman in that it involved torture, an aggravated battery to the victim and a depravity of mind on the part of the defendant. Ga. Code Ann. § 27-2534.1(b)(7).

Petitioner asserts, under his third argument, that the Supreme Court of Georgia acted outside of its scope of authority in reaffirming Petitioner's death sentence under that aggravating circumstance upon remand from this Court. Specifically, Petitioner asserts that the Georgia Supreme Court should have ordered a new jury sentencing proceeding to be conducted by the Georgia Supreme Court upon remand was improper, because the jury which imposed the death penalty under the aforesaid statute was unguided as to the meaning and application of said statute. These arguments were also raised in the first two petitions for certiorari filed by Petitioner. Although the second of the aforesaid arguments was presented to the state habeas court, the first contention pertaining to the propriety of the reaffirmance of Petitioner's death penalty in the absence of a new sentencing proceeding following remand from this Court was not presented to the state habeas court.

It is important to note that following Petitioner's retrial on sentencing, the Georgia Supreme Court considered the death penalty as it was required to do under Georgia law. Ga. Code Ann. § 27-2537. Under this provision, the Georgia Court is authorized and directed to conduct an appellate review of the sentence imposed by the trial court. The initial decision following resentencing

affirmed Petitioner's death penalty after reviewing the record and transcript of Petitioner's trial and after considering both the crime and the defendant. Spraggins v. State, 243 Ga. at p. 75-76. Following the submission of the first petition for certiorari which was filed on behalf of Mr. Spraggins, this Court vacated the decision of the Georgia Supreme Court affirming Petitioner's death penalty, and remanded for consideration in light of the recent decision in Godfrey v. Georgia, supra. Thus, upon remand, the Supreme Court was merely reconducting its appellate review of the death penalty under Ga. Code Ann. § 27-2537. The Georgia Supreme Court did not reimpose the death sentence, but merely reaffirmed the one which had already been imposed by the Meriwether County jury. Spraggins v. State, 246 Ga. 432 (1980).

Respondent asserts that the Supreme Court of Georgia at no time acted as a sentencing authority, but merely conducted its appellate review examining the record to see if there was sufficient evidence to support the finding of the aggravating circumstance. Contrary to Petitioner's assertions, the remand by this Court in light of Godfrey did not require that another, new sentence proceeding be held.

Furthermore, contrary to Petitioner's assertions, there was no requirement that the Georgia Supreme Court permit Petitioner to file his briefs or conduct oral argument prior to said Court's review of this case following remand from this court on May 27, 1980. As previously noted, upon remand the Georgia Supreme Court merely conducted a portion of its previous appellate review in more detail and in light of Godfrey. The Georgia Supreme court at that time, had before it the complete record of Petitioner's trial, which included all of the information necessary to review the jury's finding on Ga. Code Ann. § 27-2534.1 (b)(7). The decision as to whether or not to allow oral argument

and additional breifing was within the sound discretion of the Georgia Court and does not rise to a constitutional violation under the facts of this case.

Godfrey v. Georgia, supra specifically dealt with the application of Ga. Code Ann. § 27-2534.1(b)(7) in that case. The jury in Godfrey recommended a death sentence based upon a partial finding under (b)(7) that the murder of the victim had been "outrageously or wantonly vile, horrible and inhuman." This Court held that there was nothing in these few words, standing alone, that implied any inherent restraint upon the arbitrary and capricious infliction of the death sentence. Godfrey at p. 1765.

In the instant case, the jury made a complete finding under the (b)(7) aggravating circumstance, and as opposed to Godfrey, the wording of the jury's finding in this case is sufficiently definite to insure against any arbitrary or capricious infliction of the death sentence, and the record as reviewed by the Georgia Supreme Court, demonstrated ample evidence to support the jury's finding that the victim suffered from torture, aggravated battery and that the Petitioner had demonstrated his depravity of mind beyond all reasonable doubt.

Petitioner additionally asserts that his death penalty should be reversed, because the jury which imposed his present death sentence had not been instructed as to the terminology and meaning of the terms under the (b)(7) code section. Respondent respectfully submits that the absence of any explanatory or limiting instructions relating to (b)(7) was not error and did not harm the Petitioner under the facts of this case. Unlike Godfrey the finding by the jury in this case of torture, aggravated

battery and depravity of mind leaves no doubt as to the jury's interpretation of (b)(7). Thus, the Georgia Supreme Court was not forced to speculate as to the jury's finding. Notwithstanding the trial court's failure to expound on the terminology of (b)(7), Petitioner's right to be free from an abritrary and capricious decision under that code section was protected through the appellate review process by the Georgia Supreme Court both on direct appeal and following remand from this Court.

At the time Petitioner's trial was reviewed on remand by the Georgia Supreme Court, said Court already had before it the benefit of this Court's opinion in Godfrey, and was able to apply its mandates in light of the facts and circumstances of this case. Here, since the jury made a sufficiently specific finding regarding the (b)(7) aggravating circumstance and since the Georgia Supreme Court adequately performed a thorough review under the facts of this case to insure said findings were sufficiently supported by the record, this Court can determine that the absence of limiting or explanatory instructions relating to the meaning of the individual terms contained in aggravating circumstance (b)(7) did not disadvantage the Petitioner or deprive him of any of his constitutional or statutory rights.

IV. THE TRIAL COURT'S INSTRUCTIONS DURING THE RESENTENCING PHASE OF PETITIONER'S TRIAL DID NOT SUFFER FROM ANY CONSTITUTIONAL DEFICIENCY AS URGED BY THE PETITIONER.

As noted previously, Petitioner's first death sentence was specifically reversed by the Georgia Supreme Court, because the trial judge, during the sentencing phase of Petitioner's trial, failed to instruct the jury that they could recommend a life sentence even if they found the existence of statutory aggravating circumstances, and further failed to inform the jury that they were authorized to consider mitigating circumstances in making their decision on the death penalty. Spraggins v. State, 240 Ga.759, 763 (1978). Petitioner again argues under his fourth argument that his death sentence following his sentencing retrial is still constitutionally defective in that the trial judge, in his written instructions to the jury, neither charged that the jury could consider mitigating circumstances nor that they could impose a life sentence even though aggravating circumstances were found to be present. Similarly to the previous three arguments tendered by Petitioner, this argument was also raised in the first two petitions which had been filed on behalf of Mr. Spraggins.

Petitioner does not assert that the trial court's oral instructions were erroneous, but focuses solely upon the written instructions which were submitted to the jury. In essence he argues that the trial judge's written instructions so overshadowed and outweighed his oral instructions, that this Court must presume that the oral instructions were either ignored by the jury or rendered ineffectual. Contrary to Petitioner's

assertions, there is absolutely no reason to assume that the jury did not give proper weight and consideration to the trial judge's oral instructions, especially when said instructions were delivered immediately before the jury deliberations began. As evidenced by Petitioner's Appendix E, the trial judge made absolutely certain that the flaws which had caused reversal of Petitioner's first sentence, were cured in this retrial. For example, the trial judge instructed as follows:

> "Under the laws of this State, every person guilty of the offense of murder shall be punished by life imprisonment or death by electrocution. In all cases for which the death penalty may be authorized, the law provides the judge shall instruct the jury concerning any evidence in extenuation, mitigation and aggravation, which the jury may consider in making their decision as to what punishment is to be imposed upon the defendant.
>
> In reaching your determination you are authorized to consider all of the evidence received by you in open court.
>
> You are authorized to consider all of the facts and circumstances of the case.
>
> Ladies and Gentlemen of the jury, in reaching your verdict you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether

mitigating circumstances exist, you are authorized to consider all of the evidence produced by the State and the defendant throughout this trial.

Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime but which may be considered as extenuating or reducing the moral culpability or blame.

In reaching this verdict, you are not required to find mitigating circumstances in order to recommend the sentence of life in prison. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case." (T. 296-297).

* * *

"Now, Ladies and Gentlemen of the jury, a list of these aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you in the jury room during your deliberations.

Ladies and Gentlemen of the jury, if you do not find that the State has proved at least one of these statutory aggravating

circumstances beyond a reasonable doubt, then you must recommend a sentence of life imprisonment.

If you should find that the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you still may, if you so choose, recommend a sentence of life imprisonment.

If you find that the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you may recommend that the death penalty be imposed, but you are not required to do so." (T. 299).

The trial court's written instructions which were given to the jury are set out in Petitioner's Appendix F. These instructions simply inform the jury which aggravating circumstances they were authorized to consider from the evidence. Contrary to Petitioner's assertions, Ga. Code Ann. § 27-2534.1(c)[5/] does not require identity content in the oral and written charges. In interpreting Code § 27-2534.1(c) the Georgia Supreme

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5/ Ga. Code Ann. § 27-2534.1(c) reads as follows: "The statutory instructions as determined by the trial court to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft highjacking, unless at least one of the statutory aggravating circumstances enumerated in Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Court has recognized that the written material to be furnished to the jury is purely of a procedural nature, and amounts to nothing more than a formulation of the jury's potential verdicts. Collier v. State, 244 Ga. 553, 509, 261 S.E.2d 364 (1979), cert. den., ___U.S.___, 100 S.Ct. 1346 (1980); McCorquodale v. State, 233 Ga. 369, 377, 211 S.E.2d 577 (1974), cert. den., 428 U.S. 910 (1976).

It is a normal procedure for the trial court, in a criminal case, to instruct the jury as to the particular form that its verdict should assume, once the jury's determination has been made as to the guilt or innocence of a particular defendant. The statutory provision in question merely standardizes the manner in which the practice shall be administered in cases in which a death penalty may be appropriate. Due to the complexity of the Georgia death penalty procedure, and the requirement that the jury designate in writing the particular aggravating circumstance or circumstances it found beyond a reasonable doubt, the Georgia Legislature recognized the necessity of giving the jury a written formulation of its potential verdict.

The operation of this procedure in the instant case did not harm the Petitioner, but only served to clarify to the jury that the death penalty would not be authorized unless it found that at least one of the aggravating circumstances had been proven by the State beyond a reasonable doubt. The interpretation of Ga. Code Ann. § 27-2534.1(c) by the Georgia Supreme Court was reasonable, and is not intended to deprive Petitioner of any of his constitutional or statutory rights. The Georgia Supreme Court's ruling should therefore be controlling on this issue. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975); Wainwright v. Sykes, 433 U.S. 72, 82 (1977).

It has long been held that a trial court's instructions to the jury should be considered, not in artificial isolation, but should be considered as a whole, and in light of the context of petitioner's entire trial. Cupp v. Naughten, 414 U.S. 141, 146-147 (1973); United States v. McLaurn, 580 F.2d 811, 812 (5th Cir. 1978); United States v. Blevins, 555 F.2d 1236, 1239 (5th Cir. 1977). Here, when the trial judge thoroughly and properly instructed the jury orally immediately prior to their deliberations, it is sheer speculation to argue, as does the Petitioner, that said oral instructions would be disregarded or ignored.

V. THE STATE HABEAS COURT'S FINDING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WAS SUPPORTED BY SUBSTANTIAL EVIDENCE PRESENTED AT THE STATE HABEAS EVIDENTIARY HEARING.

Under Petitioner's final argument he sets forth several areas wherein he claims he received ineffective assistance of counsel. A review of the record of Petitioner's trial, and a review of the testimony at the state habeas proceeding, shows that the state habeas court properly found that Petitioner failed to carry his burden of proof on this issue. The findings of the state habeas court are reflected in Petitioner's Exhibit B, pages 2 through 4.

A review of the entire record and Attorney Belcher's testimony at the state habeas evidentiary hearing shows that trial Attorney Belcher thoroughly investigated Petitioner's case, spoke with Petitioner on several occasions, spoke with the investigating police officers, canvassed the scene of the crime and attempted to find favorable witnesses and evidence, obtained Petitioner's school records, and spoke with his family. Attorney Belcher did not petition the court for funds for an independent psychiatric examination, because he was satisfied that the Petitioner had received an adequate examination by the court appointed psychiatrist. He had no reason to doubt the report from Central State Hospital on Petitioner's psychiatric condition. Petitioner mistakenly informs this Court that counsel presented no evidence during the special plea hearing. A review of the hearing

transcript demonstrates that one witness was called to testify on behalf of the Petitioner.

Contrary to Petitioner's bald assertions, Mr. Belcher's conduct during trial, including the voir dire of jurors was adequate. The record shows that Attorney Belcher adequately presented Petitioner's defense, adequately cross-examined state witnesses, and adequately made objections and presented arguments. Petitioner claims that at the resentencing trial Attorney Belcher failed to ask prospective jurors as to their knowledge of the first trial or its outcome; however, a review of the prosecutor's statutory questions presented to the jury demonstrates that this area was adequately covered. Also, contrary to Petitioner's assertions, the district attorney's arguments did not deprive Petitioner of a fundamentally fair trial, and Mr. Belcher's failure to object to specific portions of same did not constitute ineffective assistance.

The standard for effective assistance under the Sixth Amendment to the United States Constitution appears to be well established, and simply must be applied to the facts of each particular case. A criminal defendant is entitled to representation by an attorney reasonably likely to render and rendering reasonably effective assistance. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Jones v. Estelle, 622 F.2d 124 (1980). As noted recently by this Court in Cuyler v. Sullivan, 446 U.S. 335 (1980), the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution attaches whether or not counsel was appointed or retained. The standard does not require errorless counsel, nor counsel judged ineffective

by hindsight. United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980). The totality of the circumstances surrounding the trial, and the entire record must be considered in examining the performance of counsel. See, e.g., Lovett v. State of Florida, 627 F.2d 706 (5th Cir. 1980); Lee v. Hopper, 499 F.2d 456 (5th Cir. 1974).

Here, contrary to Petitioner's assertions, a review of the actions of Attorney Belcher, when viewed in light of the entire record, amply demonstrates that Petitioner received effective assistance of counsel in accordance with the federal standard. Thus, certiorari should not be granted to review the final issue which Petitioner raises.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully submits that this Court should deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

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